MONTANA

CODE

ANNOTATED

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MONTANA CODE ANNOTATED

CONTENTS

Volume 1

GOVERNMENT-RELATED

Titles

1. General Laws and Definitions
2. State Government Administration
3. Judiciary, Courts
4. Reserved
5. Legislative Branch
6. Reserved

Volume 2

LOCAL GOVERNMENT

Titles

7. Local government

8 and 9.— Reserved

Volume 3

GOVERNMENT-RELATED

Titles

10. Military Affairs and Disaster and Emergency Services

11 and 12.— Reserved

13. Elections
14. Reserved
15. Taxation)
16. Alcohol and Tobacco) Finances
17. State Finance)
18. Public Contracts
19. Public Retirement Systems

Volume 4

EDUCATION — LEISURE TIME

Titles

20. Education
21. Reserved
22. Libraries, Arts, and Antiquities
23. Parks, Recreation, Sports, and Gambling
24. Reserved

Volume 5

CIVIL PROCEDURE — LEGAL RELATIONSHIPS

Titles

25. Civil Procedure
26. Evidence
27. Remedies
28. Contracts and Other Obligations
29. Reserved

Volume 6

BUSINESS — FINANCE — INSURANCE

Titles

30. Trade and Commerce
31. Credit Transactions and Relationships
32. Financial Institutions
33. Insurance
34. Reserved

Volume 7

CORPORATIONS — PROFESSIONS — LABOR

Titles

35. Corporations, Partnerships, and Associations
36. Reserved
37. Professions and Occupations
38. Reserved
39. Labor

Volume 8

FAMILY—CRIME—SOCIAL SERVICES

Titles

40. Family Law
41. Minors

42 and 43.— Reserved

44. Law Enforcement
45. Crimes
46. Criminal Procedure

47 and 48.— Reserved

49. Human Rights
50. Health and Safety

51 and 52.— Reserved

53. Social Services and Institutions

54 - 59.— Reserved

Volume 9

TRANSPORTATION — PROPERTY — ESTATES

Titles

60. Highways
61. Motor Vehicles and Traffic Regulations

62 - 66 — Reserved

67. Aeronautics
68. Reserved
69. Public Utilities and Carriers
70. Property
71. Mortgages, Pledges, and Liens
72. Estates, Trusts, and Fiduciary Relationships

73 and 74.— Reserved

Volume 10

NATURAL RESOURCES

Titles

75. Environmental Protection
76. Land Resources and Use
77. State Lands

78 and 79.— Reserved

80. Agriculture
81. Livestock

Volume 11

NATURAL RESOURCES — PLANNING

Titles

82. Minerals, Oil, and Gas

83 and 84.— Reserved

85. Water Use
86. Reserved
87. Fish and Game

88 and 89.— Reserved

90. Planning, Research, and Development

91 - 99.— Reserved

TITLE 25

CIVIL PROCEDURE

Ch.
1. General Provisions.
2. Venue.
3. Service of Process and Other Papers.
4. Pleadings, Motions, and Other Papers.
5. Parties.
Chapter 6 reserved.
7. Trials.
8. Deposit in Court — Delivery to Party.
9. Judgment.
10. Costs.
11. New Trial.
12. Appeal to Supreme Court.
13. Execution of Judgment.
14. Proceedings in Aid of Execution.
15. Liability of Joint Debtors.
Chapters 16 through 19 reserved.
20. Rules of Civil Procedure.
21. Rules of Appellate Civil Procedure.
Chapters 22 through 29 reserved.
30. Procedure in Municipal Courts.
31. Procedure in Justices' Courts.
32. Procedure in City Courts.
33. Appeal to District Court From Justices' and City Courts.
34. Small Claims Procedure — District Court.
35. Small Claims Procedure — Justice's Court.

CHAPTER 1

GENERAL PROVISIONS

Part 1 — Civil Actions—Form and Commencement

Section
25-1-101. One form of civil action.
25-1-102. Limitations on commencing actions.
25-1-103. When action considered pending.

Part 2 — Fees

25-1-201. Fees of clerk of district court.
25-1-202. Fee for court reporter.

Part 3 — Time

25-1-301. Extension of time.

Part 4 — Undertakings for Security

25-1-401. Deposit of money in lieu of undertaking.
25-1-402. Governmental entities not required to give security.

Part 1

Civil Actions — Form and Commencement

25-1-101. One form of civil action. There is in this state but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs.

History: En. Sec. 1, p. 43, Bannack Stat.; amd. Sec. 1, p. 135, L. 1867; amd. Sec. 1, p. 28, Cod. Stat. 1871; re-en. Sec. 1, p. 40, L. 1877; re-en. Sec. 1, 1st Div. Rev. Stat. 1879; re-en. Sec. 1, 1st Div. Comp. Stat. 1887; amd. Sec. 460, C. Civ. Proc. 1895; re-en. Sec. 6425, Rev. C. 1907; re-en. Sec. 9008, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 307; re-en. Sec. 9008, R.C.M. 1935; R.C.M. 1947, 93-2301.

25-1-102. Limitations on commencing actions. (1) Civil actions can only be commenced within the periods prescribed in [93-2501 to 93-2720] after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute.

(2) The word "action", as used in this section, is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature.

History: (1)En. Sec. 1, p. 466, Bannack Stat.; re-en. Sec. 1, p. 515, Cod. Stat. 1871; re-en. Sec. 28, p. 45, L. 1877; re-en. Sec. 28, 1st Div. Rev. Stat. 1879; re-en. Sec. 28, 1st Div. Comp. Stat. 1887; re-en. Sec. 470, C. Civ. Proc. 1895; re-en. Sec. 6428, Rev. C. 1907; re-en. Sec. 9011, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 312; re-en. Sec. 9011, R.C.M. 1935; Sec. 93-2401, R.C.M. 1947; (2)En. Sec. 559, C. Civ. Proc. 1895; re-en. Sec. 6476, Rev. C. 1907; re-en. Sec. 9066, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 363; re-en. Sec. 9066, R.C.M. 1935; Sec. 93-2720, R.C.M. 1947; R.C.M. 1947, 93-2401, 93-2720.

25-1-103. When action considered pending. An action is deemed to be pending from the time of its commencement until its final determination upon appeal or until the time for appeal has passed, unless the judgment is sooner satisfied.

History: En. Sec. 1895, C. Civ. Proc. 1895; re-en. Sec. 7188, Rev. C. 1907; re-en. Sec. 9821, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1049; re-en. Sec. 9821, R.C.M. 1935; R.C.M. 1947, 93-8706.

Part 2

Fees

25-1-201. Fees of clerk of district court. (1) The clerk of the district court shall collect the following fees:

(a) at the commencement of each action or proceeding, from the plaintiff or petitioner, $20; and for filing a complaint in intervention, from the intervenor, $20;

(b) from each defendant or respondent, on his appearance, $10;

(c) on the entry of judgment, from the prevailing party, $10;

(d) for preparing copies of papers on file in his office, 25 cents per page;

(e) for each certificate or oath and jurat, with seal, 50 cents;

(f) for oath and jurat, with seal, 50 cents;

(g) for administering oath, 25 cents;

(h) for taking depositions, per folio, 20 cents;

(i) for filing and docketing a transcript of judgment or abstract of judgment from all other courts, $5;

(j) for issuing an execution or order of sale on a foreclosure of a lien, $2;

(k) for transmission of records or files or transfer of a case to another court, $5;

(l) for filing and entering papers received by transfer from other courts, $10;

(m) for issuing a marriage license, $15;

(n) on the filing of an application for informal, formal, or supervised probate or for the appointment of a personal representative or the filing of a petition for the appointment of a guardian or conservator, from the applicant or petitioner, $35, which includes the fee for filing a will for probate.

(2) Forty percent of all fees collected by the clerk of the district court shall be deposited in and credited to the general fund of the county. The remaining portion of the fees shall be remitted to the state to be deposited as provided in 19-5-404.

History: En. Sec. 4636, Pol. C. 1895; re-en. Sec. 3169, Rev. C. 1907; amd. Sec. 1, Ch. 88, L. 1917; re-en. Sec. 4918, R.C.M. 1921; re-en. Sec. 4918, R.C.M. 1935; amd. Sec. 1, Ch. 218, L. 1967; amd. Sec. 1, Ch. 33, L. 1977; amd. Sec. 1, Ch. 548, L. 1977; R.C.M. 1947, 25-232.

25-1-202. Fee for court reporter. In every issue of fact in civil actions tried before the court or jury, before the trial commences, there must be paid into the hands of the clerk of the court by each party to the suit the sum of $3, which sum must be paid by said clerk into the treasury of the county where the cause is tried to be applied upon the payment of the salary of the reporter. The prevailing party may have the amount so paid by him taxed in his bill of costs as proper disbursements.

History: En. Sec. 1979, 5th Div. Comp. Stat. 1887; re-en. Sec. 374, C. Civ. Proc. 1895; re-en. Sec. 6377, Rev. C. 1907; re-en. Sec. 8932, R.C.M. 1921; re-en. Sec. 8932, R.C.M. 1935; amd. Sec. 5, Ch. 22, L. 1961; R.C.M. 1947, 93-1905.

Part 3

Time

25-1-301. Extension of time. When an act to be done, as provided in this code, relates to the pleadings in the action, the undertakings to be filed, the justification of sureties, the preparation of statements or of bills of exceptions or of amendments thereto, or the service of notices other than of appeal, the time allowed by this code may be extended, upon good cause shown, by the court in which the action is pending or a judge thereof; but such extension shall not exceed 90 days without the consent of the adverse party.

History: En. Sec. 1897, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 27, L. 1903; re-en. Sec. 7190, Rev. C. 1907; re-en. Sec. 9823, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1054; re-en. Sec. 9823, R.C.M. 1935; R.C.M. 1947, 93-8708.

Part 4

Undertakings for Security

25-1-401. Deposit of money in lieu of undertaking. In all cases where an undertaking or bond with sureties is required by the provisions of this code, the plaintiff or defendant may deposit with the clerk of the court or justice of the peace or city judge, as the case may be, a sum of money equal to the amount required by the undertaking or bond, which shall be taken as security in the place thereof. At any time such deposit may be withdrawn by the party making it upon giving the undertaking with sufficient sureties as required by law, approved by the clerk or justice or judge, upon notice to the adverse party or his attorney, who may object to the sufficiency of the sureties in the same manner as though the undertaking were filed in the first instance.

History: En. Sec. 1904, C. Civ. Proc. 1895; re-en. Sec. 7198, Rev. C. 1907; re-en. Sec. 9831, R.C.M. 1921; re-en. Sec. 9831, R.C.M. 1935; R.C.M. 1947, 93-8716.

25-1-402. Governmental entities not required to give security. In any civil action or proceeding wherein the state, a county, or a municipal corporation or any officer in his official capacity on behalf of the state or a county, city, or town is a party plaintiff or defendant, no bond, undertaking, or security can be required of the state, county, municipal corporation, or town or any officer thereof; but on complying with the other provisions of this code, the state, county, municipal corporation, or town or any officer thereof acting in his official capacity has the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this code. The board of trustees of any school district is entitled to the benefit of this section.

History: En. Sec. 1902, C. Civ. Proc. 1895; re-en. Sec. 7196, Rev. C. 1907; re-en. Sec. 9829, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1058; re-en. Sec. 9829, R.C.M. 1935; R.C.M. 1947, 93-8714.

CHAPTER 2

VENUE

Part 1 — Proper Venue

Section
25-2-101. Contract actions.
25-2-102. Tort actions.
25-2-103. Actions involving real property.
25-2-104. Actions to recover statutory penalty or forfeiture.
25-2-105. Actions against public officers or their agents.
25-2-106. Actions against counties.
25-2-107. Actions in which defendant is about to depart.
25-2-108. Other actions.

Part 2 — Change of Venue

25-2-201. When change of venue required.
25-2-202. Change of venue on agreement of parties.
25-2-203. Papers to be transmitted.
25-2-204. Jurisdiction preserved.
25-2-205. Allocation of costs between counties.
25-2-206. Judgment affecting real property to be transmitted.

Part 1

Proper Venue

25-2-101. Contract actions. Actions upon contracts may be tried in the county in which the contract was to be performed, subject, however, to the power of the court to change the place of trial as provided in this code.

History: En. Sec. 20, p. 46, Bannack Stat.; amd. Sec. 20, p. 138, L. 1867; en. Sec. 25, p. 31, Cod. Stat. 1871; re-en. Sec. 59, p. 52, L. 1877; re-en. Sec. 59, 1st

Div. Rev. Stat. 1879; re-en. Sec. 59, 1st Div. Comp. Stat. 1887; re-en. Sec. 613, C. Civ. Proc. 1895; re-en. Sec. 6504, Rev. C. 1907; re-en. Sec. 9096, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 395; re-en. Sec. 9096, R.C.M. 1935; R.C.M. 1947, 93-2904(part).

25-2-102. Tort actions. Actions for torts may be tried in the county where the tort was committed, subject, however, to the power of the court to change the place of trial as provided in this code.

History: En. Sec. 20, p. 46, Bannack Stat.; amd. Sec. 20, p. 138, L. 1867; en. Sec. 25, p. 31, Cod. Stat. 1871; re-en. Sec. 59, p. 52, L. 1877; re-en. Sec. 59, 1st Div. Rev. Stat. 1879; re-en. Sec. 59, 1st Div. Comp. Stat. 1887; re-en. Sec. 613, C. Civ. Proc. 1895; re-en. Sec. 6504, Rev. C. 1907; re-en. Sec. 9096, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 395; re-en. Sec. 9096, R.C.M. 1935; R.C.M. 1947, 93-2904(part).

25-2-103. Actions involving real property. (1) Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial as provided in this code:

(a) for the recovery of real property or of an estate or an interest therein or for the determination, in any form, of such right or interest;

(b) for injuries to real property;

(c) for the partition of real property;

(d) for the foreclosure of all liens and mortgages on real property.

(2) Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties and the county so selected is the proper county for the trial of such action.

(3) All actions for the recovery of the possession of, quieting the title to, or the enforcement of liens upon real property must be commenced in the county in which the real property, or any part thereof, affected by such action or actions is situated.

History: (1), (2)En. Sec. 18, p. 46, Bannack Stat.; en. Sec. 18, p. 137, L. 1867; re-en. Sec. 23, p. 30, Cod. Stat. 1871; re-en. Sec. 56, p. 51, L. 1877; re-en. Sec. 56, 1st Div. Rev. Stat. 1879; re-en. Sec. 56, 1st Div. Comp. Stat.1887; re-en. Sec. 610, C. Civ. Proc. 1895; re-en. Sec. 6501, Rev. C. 1907; re-en. Sec. 9093, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 392; re-en. Sec. 9093, R.C.M. 1935; Sec. 93-2901, R.C.M. 1947; (3)En. Sec. 43, C. Civ. Proc. 1895; re-en. Sec. 6277, Rev. C. 1907; re-en. Sec. 8831, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 78; re-en. Sec. 8831, R.C.M. 1935; Sec. 93-320, R.C.M. 1947; R.C.M. 1947, 93-320(part), 93-2901.

25-2-104. Actions to recover statutory penalty or forfeiture. Actions for the recovery of a penalty or forfeiture imposed by statute must be tried in the county where the cause or some part thereof arose, subject to the power of the court to change the place of trial, except that when it is imposed for an offense committed on a lake, river, or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream and opposite to the place where the offense was committed.

History: En. Sec. 19, p. 46, Bannack Stat.; re-en. Sec. 19, p. 137, L. 1867; re-en. Sec. 24, p. 31, Cod. Stat. 1871; re-en. Sec. 57, p. 51, L. 1877; re-en. Sec. 57, 1st Div. Rev. Stat. 1879; re-en. Sec. 57, 1st Div. Comp. Stat. 1887; re-en. Sec. 611, C. Civ. Proc. 1895; re-en. Sec. 6502, Rev. C. 1907; re-en. Sec. 9094, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 393; re-en. Sec. 9094, R.C.M. 1935; R.C.M. 1947, 93-2902(part).

25-2-105. Actions against public officers or their agents. Actions against a public officer or person specially appointed to execute his duties for an act done by him in virtue of his office or against a person who, by his command or in his aid, does anything touching the duties of such officer must be tried in the county where the cause or some part thereof arose, subject to the power of the court to change the place of trial.

History: En. Sec. 19, p. 46, Bannack Stat.; re-en. Sec. 19, p. 137, L. 1867; re-en. Sec. 24, p. 31, Cod. Stat. 1871; re-en. Sec. 57, p. 51, L. 1877; re-en. Sec. 57, 1st Div. Rev. Stat. 1879; re-en. Sec. 57, 1st Div. Comp. Stat. 1887; re-en. Sec. 611, C. Civ. Proc. 1895; re-en. Sec. 6502, Rev. C. 1907; re-en. Sec. 9094, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 393; re-en. Sec. 9094, R.C.M. 1935; R.C.M. 1947, 93-2902(part).

25-2-106. Actions against counties. An action against a county may be commenced and tried in such county unless such action is brought by a county, in which case it may be commenced and tried in any county not a party thereto.

History: En. Sec. 58, p. 52, L. 1877; re-en. Sec. 58, 1st Div. Rev. Stat. 1879; re-en. Sec. 58, 1st Div. Comp. Stat. 1887; amd. Sec. 612, C. Civ. Proc. 1895; re-en. Sec. 6503, Rev. C. 1907; re-en. Sec. 9095, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 394; re-en. Sec. 9095, R.C.M. 1935; R.C.M. 1947, 93-2903.

25-2-107. Actions in which defendant is about to depart. If any defendant or defendants may be about to depart from the state, the action may be tried in any county where either of the parties may reside or service be had, subject, however, to the power of the court to change the place of trial as provided in this code.

History: En. Sec. 20, p. 46, Bannack Stat.; amd. Sec. 20, p. 138, L. 1867; en. Sec. 25, p. 31, Cod. Stat. 1871; re-en. Sec. 59, p. 52, L. 1877; re-en. Sec. 59, 1st Div. Rev. Stat. 1879; re-en. Sec. 59, 1st Div. Comp. Stat. 1887; re-en. Sec. 613, C. Civ. Proc. 1895; re-en. Sec. 6504, Rev. C. 1907; re-en. Sec. 9096, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 395; re-en. Sec. 9096, R.C.M. 1935; R.C.M. 1947, 93-2904(part).

25-2-108. Other actions. In all other cases, the action shall be tried in the county in which the defendants or any of them may reside at the commencement of the action or where the plaintiff resides and the defendants or any of them may be found; or if none of the defendants reside in the state or, if residing in the state, the county in which they so reside be unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint, subject, however, to the power of the court to change the place of trial as provided in this code.

History: En. Sec. 20, p. 46, Bannack Stat.; amd. Sec. 20, p. 138, L. 1867; en. Sec. 25, p. 31, Cod. Stat. 1871; re-en. Sec. 59, p. 52, L. 1877; re-en. Sec. 59, 1st Div. Rev. Stat. 1879; re-en. Sec. 59, 1st Div. Comp. Stat. 1887; re-en. Sec. 613, C. Civ. Proc. 1895; re-en. Sec. 6504, Rev. C. 1907; re-en. Sec. 9096, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 395; re-en. Sec. 9096, R.C.M. 1935; R.C.M. 1947, 93-2904(part).

Part 2

Change of Venue

25-2-201. When change of venue required. The court or judge must, on motion, change the place of trial in the following cases:

(1) when the county designated in the complaint is not the proper county;
(2) when there is reason to believe that an impartial trial cannot be had therein;

(3) when the convenience of witnesses and the ends of justice would be promoted by the change.

History: En. Sec. 21, p. 46, Bannack Stat.; amd. Ch. 8, L. 3d Session 1866, which was set aside by Act of Congress of March 2, 1867; amd. Sec. 1, p. 68, L. 1867; amd. Sec. 27, p. 31, Cod. Stat. 1871; re-en. Sec. 62, p. 53, L. 1877; re-en. Sec. 62, 1st Div. Rev. Stat. 1879; re-en. Sec. 62, 1st Div. Comp. Stat. 1887; amd. Sec. 615, C. Civ. Proc. 1895; en. Ch. 2, Ex. L. 1903; re-en. Sec. 6506, Rev. C. 1907; re-en. Sec. 9098, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 397; re-en. Sec. 9098, R.C.M. 1935; amd. Sec. 1, Ch. 6, L. 1973; [(4) superseded by Sup. Ct. Ord., 34 St. Rep. 26, eff. March 1, 1977]; R.C.M. 1947, 93-2906.

25-2-202. Change of venue on agreement of parties. All the parties to an action, by stipulation or by consent in open court entered in the minutes, may agree that the place of trial may be changed to any county in the state. Thereupon the court must order the change as agreed upon.

History: En. Sec. 619, C. Civ. Proc. 1895; re-en. Sec. 6510, Rev. C. 1907; re-en. Sec. 9102, R.C.M. 1921; re-en. Sec. 9102, R.C.M. 1935; R.C.M. 1947, 93-2910.

25-2-203. Papers to be transmitted. When an order is made transferring an action or proceeding for trial, the clerk of the court must transmit the pleading and papers therein to the clerk of the court to which it is transferred.

History: En. Sec. 64, p. 53, L. 1877; re-en. Sec. 64, 1st Div. Rev. Stat. 1879; re-en. Sec. 64, 1st Div. Comp. Stat. 1887; re-en. Sec. 617, C. Civ. Proc. 1895; re-en. Sec. 6508, Rev. C. 1907; re-en. Sec. 9100, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 399; re-en. Sec. 9100, R.C.M. 1935; amd. Sec. 1, Ch. 176, L. 1971; R.C.M. 1947, 93-2908(part).

25-2-204. Jurisdiction preserved. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein.

History: En. Sec. 64, p. 53, L. 1877; re-en. Sec. 64, 1st Div. Rev. Stat. 1879; re-en. Sec. 64, 1st Div. Comp. Stat. 1887; re-en. Sec. 617, C. Civ. Proc. 1895; re-en. Sec. 6508, Rev. C. 1907; re-en. Sec. 9100, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 399; re-en. Sec. 9100, R.C.M. 1935; amd. Sec. 1, Ch. 176, L. 1971; R.C.M. 1947, 93-2908(part).

25-2-205. Allocation of costs between counties. In case of a change of the place of trial from one county to another, as provided for in 25-2-201, the county in which the action or proceeding is tried shall recover from the county in which the action was commenced all additional costs or expenses that may have been incurred by such county by reason of extra jurors or bailiff's fees or other court expenses incurred by such county by reason of the hearing or trial of said action, motion, or proceeding. Such extra costs shall be allowed by the court, the clerk of the court of such county shall certify the same to the board of county commissioners of the county in which said action, motion, or proceeding was commenced, and said board shall allow and cause the same to be paid.

History: En. Sec. 1, Ch. 5, Ex. L. 1903; re-en. Sec. 6512, Rev. C. 1907; re-en. Sec. 9104, R.C.M. 1921; re-en. Sec. 9104, R.C.M. 1935; R.C.M. 1947, 93-2912.

25-2-206. Judgment affecting real property to be transmitted. When an action or proceeding affecting the title to or possession of real estate has been brought in or transferred to any court of a county other than the county in which the real estate or some portion of it is situated, the clerk of such court must, after final judgment therein, certify under his seal of office and transmit to the corresponding court of the county in which the real estate affected by the action is situated a copy of the judgment. The clerk receiving such copy must file, docket, and record the judgment in the record of the court, briefly designating it as a judgment transferred from .... court (naming the proper court).

History: **En. Sec. 65, p. 54, L. 1877; re-en. Sec. 65, 1st Div. Rev. Stat. 1879; re-en. Sec. 65, 1st Div. Comp. Stat. 1887; re-en. Sec. 618, C. Civ. Proc. 1895; re-en. Sec. 6509, Rev. C. 1907; re-en. Sec. 9101, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 400; re-en. Sec. 9101, R.C.M. 1935; R.C.M. 1947, 93-2909.**

CHAPTER 3

SERVICE OF PROCESS AND OTHER PAPERS

Part 1 — General Provisions

Section
25-3-101. Definitions.

Part 2 — Service by an Officer

25-3-201. Delivery of papers to officer.
25-3-202. When sheriff's execution of process justified and required.
25-3-203. Prepayment of cost of service.
25-3-204. Officer to exhibit process.
25-3-205. Execution of process when sheriff a party.
25-3-206. Execution by elisor.

Part 3 — Return of Service

25-3-301. Time and manner of return.
25-3-302. Sheriff's return prima facie evidence.

Part 4 — Service of Papers After Defendant's Appearance

25-3-401. Notice requirements after appearance of defendant.
25-3-402. Persons to be served.

Part 5 — Alternative Methods of Service

25-3-501. Service of telephonic or telegraphic copy.
25-3-502. Publication to be once a week.
25-3-503. What suffices as once a week.
25-3-504. Designating unknown persons as defendants.
25-3-505. Effect of service by publication upon unknown persons.

Part 6 — Service on Secretary of State Nonresident Motorists

25-3-601. Conditional granting of use of highways to nonresidents.
25-3-602. Operation of vehicle considered consent to service on secretary of state.
25-3-603. Operation of vehicle by agent.
25-3-604. Secretary of state's record of process served.

Part 1

General Provisions

25-3-101. Definitions. As used in parts 2 and 3 of this chapter, the following definitions apply:

(1) "Process" includes all writs, warrants, summonses, and orders of courts of justice or judicial officers.

(2) "Notice" includes all papers and orders (except process) required to be served in any proceeding before any court, board, or officer or required by law to be served independently of such proceeding.

History: En. Sec. 4380, Pol. C. 1895; re-en. Sec. 3009, Rev. C. 1907; re-en. Sec. 4773, R.C.M. 1921; Cal. Pol. C. Sec. 4175; re-en. Sec. 4773, R.C.M. 1935; R.C.M. 1947, 16-2701.

Part 2

Service by an Officer

25-3-201. Delivery of papers to officer. (1) It is the duty of the clerk of any district court, at the request of a party in any civil action pending in such court or his agent or attorney, to forward by mail any process, summons, or other papers required in the cause; and it is the duty of the sheriff or other officer to whom said papers may be directed to receive the same at the place where the same are directed. When process in one county is intended for service in another, it is the duty of the clerk to forward the same in like manner.

(2) Any writ, order, or other paper for service must be received at any place in the county where a sheriff or a deputy is found, but if papers are delivered for service away from the county seat, all necessary copies thereof must be furnished for service.

(3) If any sheriff or other officer refuse to receive any summons or other process at the point where directed to him or to serve the same, he is guilty of a misdemeanor and upon conviction thereof must be fined in any sum not exceeding $100.

History: (1), (3)En. Secs. 1, 2, p. 7, L. 1881; re-en. Sec. 76, 1st Div. Comp. Stat. 1887; en. Sec. 640, C. Civ. Proc. 1895; re-en. Sec. 6523, Rev. C. 1907; re-en. Sec. 9120, R.C.M. 1921; re-en. Sec. 9120, R.C.M. 1935; Sec. 93-3016, R.C.M. 1947; (2)En. Sec. 4634, Pol. C. 1895; re-en. Sec. 3167, Rev. C. 1907; amd. Sec. 1, Ch. 111, L. 1919; re-en. Sec. 4916, R.C.M. 1921; amd. Sec. 1, Ch. 111, L. 1927; amd. Sec. 1, Ch. 89, L. 1929; amd. Sec. 1, Ch. 121, L. 1933; re-en. Sec. 4916, R.C.M. 1935; amd. Sec. 1, Ch. 139, L. 1937; amd. Sec. 4, Ch. 121, L. 1941; amd. Sec. 2, Ch. 59, L. 1949; amd. Sec. 2, Ch. 82, L. 1957; amd. Sec. 1, Ch. 343, L. 1975; amd. Sec. 8, Ch. 439, L. 1975; Sec. 25-226, R.C.M. 1947; R.C.M. 1947, 25-226(part), 93-3016(part).

25-3-202. When sheriff's execution of process justified and required. A sheriff or other ministerial officer is justified in the execution of and must execute all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued.

History: En. Sec. 4395, Pol. C. 1895; re-en. Sec. 3024, Rev. C. 1907; re-en. Sec. 4788, R.C.M. 1921; Cal. Pol. C. Sec. 4187; re-en. Sec. 4788, R.C.M. 1935; R.C.M. 1947, 16-2716.

25-3-203. Prepayment of cost of service. In no case shall the officer receiving papers for service be required to serve the same unless the person in whose behalf the service is made or his agent or attorney first pay the cost of the service upon a demand therefor by the officer.

History: En. Secs. 1, 2, p. 7, L. 1881; re-en. Sec. 76, 1st Div. Comp. Stat. 1887; en. Sec. 640, C. Civ. Proc. 1895; re-en. Sec. 6523, Rev. C. 1907; re-en. Sec. 9120, R.C.M. 1921; re-en. Sec. 9120, R.C.M. 1935; R.C.M. 1947, 93-3016(part).

25-3-204. Officer to exhibit process. The officer executing such process must, then and at all times subsequent so long as he retains it, upon request, show the same with all papers attached to any person interested therein.

History: En. Sec. 4396, Pol. C. 1895; re-en. Sec. 3025, Rev. C. 1907; re-en. Sec. 4789, R.C.M. 1921; Cal. Pol. C. Sec. 4188; re-en. Sec. 4789, R.C.M. 1935; R.C.M. 1947, 16-2717.

25-3-205. Execution of process when sheriff a party. When the sheriff is a party to an action or proceeding, the process and orders therein which it would otherwise be the duty of the sheriff to execute must be executed by the coroner of the county.

History: En. Sec. 4399, Pol. C. 1895; re-en. Sec. 3028, Rev. C. 1907; re-en. Sec. 4792, R.C.M. 1921; Cal. Pol. C. Sec. 4191; re-en. Sec. 4792, R.C.M. 1935; R.C.M. 1947, 16-2720.

25-3-206. Execution by elisor. (1) Process or orders in an action or proceeding may be executed by a person residing in the county, designated by the court or a judge thereof, and denominated an elisor, in the following cases:

(a) The sheriff and coroner are both parties.

(b) Either of these officers is a party and the process is against the other.

(c) Either of these officers is a party and there is a vacancy in the office of the other.

(d) It appears by affidavit to the satisfaction of the court in which the proceeding is pending or the judge thereof that both of these officers are disqualified or, by reason of any bias, prejudice, or other cause, would not act promptly or impartially.

(2) When process is delivered to an elisor, he must execute and return it in the same manner as the sheriff is required to execute similar process. The court or judge may at any time on its own motion appoint an elisor.

History: En. Sec. 4400, Pol. C. 1895; re-en. Sec. 3029, Rev. C. 1907; re-en. Sec. 4793, R.C.M. 1921; Cal. Pol. C. Sec. 4192; re-en. Sec. 4793, R.C.M. 1935; R.C.M. 1947, 16-2721.

Part 3

Return of Service

25-3-301. Time and manner of return. (1) It shall be the duty of the sheriff or other person serving a summons or other process or order required by any of the provisions of this code, issued out of any of the district courts of this state, to make due and legal return of such service and file the same with the clerk of the court in which such action or proceeding is pending not more than 10 days after the making of such service where the same was made in the county in which such action or proceeding is pending and not more than 15 days after the making of such service when the same was made outside of the county in which such action or proceeding is pending. Any failure to make and file such return as required may be punished as a contempt of court.

(2) When process or notices are returnable to another county, the sheriff may enclose such process or notice in an envelope addressed to the officer who sent it and deposit it in the post office, prepaying postage.

(3) In the case of papers forwarded under 25-3-201, it is lawful for the officer to return the process to the court by mail or express. When process in one county is intended for service in another, the sheriff or other officer serving the same may make like return of the papers served.

History: (1)En. Sec. 1, Ch. 38, L. 1907; re-en. Sec. 6527, Rev. C. 1907; re-en. Sec. 9124, R.C.M. 1921; re-en. Sec. 9124, R.C.M. 1935; Sec. 93-3020, R.C.M. 1947; (2)En. Sec. 4385, Pol. C. 1895; re-en. Sec. 3014, Rev. C. 1907; re-en. Sec. 4778, R.C.M. 1921; Cal. Pol. C. Sec. 4177; re-en. Sec. 4778, R.C.M. 1935; Sec. 16-2706, R.C.M. 1947; (3)En. Secs. 1, 2, p. 7, L. 1881; re-en. Sec. 76, 1st Div. Comp. Stat. 1887; en. Sec. 640, C. Civ. Proc. 1895; re-en. Sec. 6523, Rev. C. 1907; re-en. Sec. 9120, R.C.M. 1921; re-en. Sec. 9120, R.C.M. 1935; Sec. 93-3016, R.C.M. 1947; R.C.M. 1947, 16-2706, 93-3016(part), 93-3020.

25-3-302. Sheriff's return prima facie evidence. The return of the sheriff upon process or notices is prima facie evidence of the facts in such return stated.

History: En. Sec. 4386, Pol. C. 1895; re-en. Sec. 3015, Rev. C. 1907; re-en. Sec. 4779, R.C.M. 1921; Cal. Pol. C. Sec. 4178; re-en. Sec. 4779, R.C.M. 1935; R.C.M. 1947, 16-2707.

Part 4

Service of Papers After Defendant's Appearance

25-3-401. Notice requirements after appearance of defendant. A defendant appears in an action when he answers, files a motion, or gives the plaintiff written notice of his appearance or when an attorney gives notice of appearance for him or has such appearance entered in open court. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given.

History: En. Sec. 494, p. 232, L. 1867; re-en. Sec. 574, p. 152, Cod. Stat. 1871; re-en. Sec. 478, p. 167, L. 1877; re-en. Sec. 478, 1st Div. Rev. Stat. 1879; re-en. Sec. 491, 1st Div. Comp. Stat. 1887; amd. Sec. 1834, C. Civ. Proc. 1895; re-en. Sec. 7149, Rev. C. 1907; re-en. Sec. 9782, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1014; re-en. Sec. 9782, R.C.M. 1935; amd. Sec. 1, Ch. 4, L. 1963; R.C.M. 1947, 93-8505.

25-3-402. Persons to be served. When a plaintiff or a defendant who has appeared resides out of this state and has no attorney in the action or proceeding, the service may be made on the clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except of subpoenas, writs, and other process issued in the suit and papers to bring him into contempt.

History: En. Sec. 495, p. 232, L. 1867; re-en. Sec. 575, p. 153, Cod. Stat. 1871; re-en. Sec. 479, p. 168, L. 1877; re-en. Sec. 479, 1st Div. Rev. Stat. 1879; re-en. Sec. 492, 1st Div. Comp. Stat. 1887; re-en. Sec. 1835, C. Civ. Proc. 1895; re-en. Sec. 7150, Rev. C. 1907; re-en. Sec. 9783, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1015; re-en. Sec. 9783, R.C.M. 1935; R.C.M. 1947, 93-8506.

Part 5

Alternative Methods of Service

25-3-501. Service of telephonic or telegraphic copy. (1) Any summons, writ, or order in any civil action or proceeding and all other papers requiring service may be transmitted by telegraph or telephone for such service in any place; and the telegraphic or telephonic copy of such writ, order, or paper so transmitted may be served or executed by the officer or person to whom it is sent for that purpose and returned by him, if any return be requisite, in the same manner and with the same force and effect in all respects as the original thereof might be delivered to him; and the officer or person serving or executing the same has the same authority and is subject to the same liabilities as if the copy were the original.

(2) The original, when a writ or order, must also be filed in the court from which it was issued, and a certified copy thereof must be preserved in the telegraph or telephone office from which it is sent. In sending it, either the original or certified copy may be used by the operator for that purpose. Whenever any document to be sent by telegraph or telephone bears a seal, either private or official, it is not necessary for the operator, in sending the same, to telegraph or telephone a description of the seal or any words or device thereon, but the same may be expressed in the telegraphic or telephonic copy by the letters "L.S." or by the word "seal".

History: En. Sec. 1837, C. Civ. Proc. 1895; re-en. Sec. 7152, Rev. C. 1907; re-en. Sec. 9785, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1017; re-en. Sec. 9785, R.C.M. 1935; R.C.M. 1947, 93-8508.

25-3-502. Publication to be once a week. Where not otherwise expressly prescribed by law, all rules, orders, and decrees of court, summonses, and notices of all kinds, whether given by any court, judge, or clerk thereof or by any other officer, board, or commission, which by the laws of this state are required to be published in any newspaper shall be published once a week during the time prescribed by law for publication thereof, whether such publication be made in a weekly, semiweekly, triweekly, or daily newspaper.

History: En. Sec. 1, Ch. 104, L. 1917; re-en. Sec. 9833, R.C.M. 1921; re-en. Sec. 9833, R.C.M. 1935; R.C.M.1947, 93-8718.

25-3-503. What suffices as once a week. Whenever any statute of Montana requires the publication of any notice, order, or other paper or document in any newspaper once a week for any specified number of weeks, it shall be sufficient to so publish the same once each week for such number of times as shall equal the number of weeks so designated.

History: En. Sec. 1, Ch. 76, L. 1929; re-en. Sec. 9833.1, R.C.M. 1935; R.C.M. 1947, 93-8719.

25-3-504. Designating unknown persons as defendants. (1) In all actions or proceedings to obtain title or possession, for partition, for sale, for foreclosure of any encumbrance, for enforcement of any trust, for specific performance of any contract, to quiet title, or for any other disposition of any property, real, personal, or mixed, situate within the state of Montana, including choses in action either situate within or due or claimed to be due from persons, firms, or corporations resident within the state of Montana, persons whose names are unknown to plaintiff may be made parties defendant, either on the filing of the complaint, cross complaint, or complaint in intervention, as the case may be, or at any time thereafter by amendment thereof, by the name and description of unknown owners, unknown heirs, or unknown devisees of any deceased person or by all of such designations.

(2) (a) When persons are made parties defendant by the designation of unknown owners, it shall not be necessary to add to such designation in the title of the action a description of the property involved, whether real, personal, or mixed, including choses in action as aforesaid, of which such persons are claimed

or supposed to be unknown owners or claimants or parties in interest, but a description of the property involved shall be included in the body of the summons for publication in the action.

(b) When persons are made defendant by the style and description of unknown heirs, there shall be added to such designation of them the name of the deceased person of whom they shall be claimed or supposed to be the heirs.

(c) When persons are made defendant by the style and description of unknown devisees, there shall be added to such designation the name of the deceased person of whom they shall be claimed or supposed to be devisees.

History: En. Sec. 1, Ch. 105, L. 1941; amd. Sec. 1, Ch. 179, L. 1943; R.C.M. 1947, 93-2819.

25-3-505. Effect of service by publication upon unknown persons. Judgments and decrees rendered in actions or proceedings when persons have been so made parties and served by publication of summons shall have the same effect in all respects as if such persons had been made parties by their own proper names and had been served by publication and mailing of summons according to the rules of civil procedure. If in such action or proceeding persons are made parties by the designation of:

(1) unknown heirs, the judgment or decree shall be conclusive as to all heirs of such deceased party;

(2) unknown devisees, the judgment or decree in such proceedings shall be conclusive as against all devisees of such deceased person;

(3) unknown owners, the judgment or decree rendered in such action or proceeding shall be conclusive as against the world, including all contingent interests in the controversy and persons not in being who may have an interest or contingent interest therein.

History: En. Sec. 2, Ch. 105, L. 1941; R.C.M. 1947, 93-2820.

Part 6

Service on Secretary of State — Nonresident Motorists

25-3-601. Conditional granting of use of highways to nonresidents. Subject to a compliance with the motor vehicle laws of this state and the acceptance of the provisions of this part and 25-10-206, nonresident owners and operators of motor vehicles hereby are granted the privilege of using the highways, roads, and streets of this state and its political subdivisions, and the use of such highways, roads, and streets shall be deemed and construed to be an acceptance of the provisions of this part and 25-10-206.

History: En. Sec. 1, Ch. 10, L. 1937; R.C.M. 1947, 53-201.

25-3-602. Operation of vehicle considered consent to service on secretary of state. The acceptance by a nonresident of the rights and privileges conferred by the laws of this state to use the highways, roads, and streets of the state and its political subdivisions, as evidenced by his operating a motor vehicle thereon, shall be deemed equivalent to and construed to be an appointment by such nonresident of the secretary of state of the state of Montana to be his true and lawful attorney upon whom may be served all lawful summonses and processes against him growing out of any accident, collision, or liability in which said nonresident may be involved while operating a motor vehicle upon such highways, roads, and streets; and said acceptance or operation shall be a signification of his agreement that any summons or process against him which is so served shall be of the same legal force and validity as if served on him personally within the state of Montana.

History: En. Sec. 2, Ch. 10, L. 1937; R.C.M. 1947, 53-202.

25-3-603. Operation of vehicle by agent. The operation by any person, by himself or his agent, of any motor vehicle, whether registered or unregistered and with or without a license to operate, on any public way in this state shall be deemed equivalent to an appointment by such person of the secretary of state or his successor in office to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him growing out of an accident or collision in which he or his agent may be involved while operating a motor vehicle on any public way in this state; and such operation shall be a signification of an agreement by such person that any such process against him which is served upon the secretary of state or his successor in office shall be of the same force and validity as if served upon him personally. This section shall not apply in case of any cause of action, for the service of process in which provision is made by 25-3-602, nor shall it authorize service of process upon any person who may with due diligence be found and personally served with process within the state of Montana.

History: En. Sec. 3, Ch. 10, L. 1937; R.C.M. 1947, 53-203.

25-3-604. Secretary of state's record of process served. The secretary of state shall keep a record of all such summonses and process, which shall show the day of service.

History: En. Sec. 6, Ch. 10, L. 1937; R.C.M. 1947, 53-206.

CHAPTER 4

PLEADINGS, MOTIONS, AND OTHER PAPERS

Part 1 — General Provisions

Section
25-4-101. Motions and orders when judge absent.
25-4-102. Transfer when judge unable to hear motion or return of order.
25-4-103. Vacating or modifying order made without notice.
Sections 25-4-104 through 25-4-110 reserved.
25-4-111. Lost papers.
25-4-112. Papers with technical defects.

Part 2 — Pleadings in General

25-4-201. Description of real property in complaint.
25-4-202. Copy of written instrument in pleading.
25-4-203. Verification of pleadings.
25-4-204. Time for amendment or reply after motion on pleading.

Part 3 — Pleading Special Matters

25-4-301. Pleading statute of limitations.
25-4-302. Pleading an account.
25-4-303. True value of property — action for taking.
Sections 25-4-304 through 25-4-310 reserved.
25-4-311. Damages for personal injury or wrongful death not to be stated.
25-4-312. Request for statement of damages — response.

25-4-313. Notice to defendant when no request for statement.
25-4-314. Permissive delivery of statement with summons.

Part 4 — Counterclaim and Cross-Claim

25-4-401. Counterclaim by person sued in representative capacity.
25-4-402. Counterclaim against person suing in representative capacity.
25-4-403. Counterclaim in action on contract.
25-4-404. Cross-claim to be asserted in answer.

Part 5 — Motion to Postpone Trial

25-4-501. Motion to postpone trial for absence of testimony.
25-4-502. No postponement when expected evidence admitted.
25-4-503. Postponement on other grounds.
25-4-504. Depositions of witnesses upon postponement.

Part 6 — Procedure After Claims Partially Admitted

25-4-601. Procedure when answer admits part of plaintiff's claim.
25-4-602. Judgment for excess when plaintiff admits counterclaim.

Part 1

General Provisions

25-4-101. Motions and orders when judge absent. (1) Motions must be made in the county in which the action is brought or in any adjoining county in the same district. In case of the absence of the judge of the district from his district or in an action pending in which such judge is disqualified to act, such motion may be made before the judge of any adjoining district, provided there is another judge in the same district who is not disqualified to act, in which case such motion shall be made before another judge in the same district.

(2) Orders made out of court may be made by the judge of the court in any part of the state.

History: En. Sec. 418, p. 128, Bannack Stat.; re-en. Sec. 487, p. 231, L. 1867; amd. Sec. 567, p. 151, Cod. Stat. 1871; amd. Sec. 470, p. 166, L. 1877; re-en. Sec. 470, 1st Div. Rev. Stat. 1879; re-en. Sec. 483, 1st Div. Comp. Stat. 1887; re-en. Sec. 1821, C. Civ. Proc. 1895; re-en. Sec. 7140, Rev. C. 1907; re-en. Sec. 9773, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1004; re-en. Sec. 9773, R.C.M. 1935; R.C.M. 1947, 93-8402.

25-4-102. Transfer when judge unable to hear motion or return of order. When a notice of motion is given or an order to show cause is made returnable before a judge out of court and, at the time fixed for the motion or on the return day of the order, the judge is unable to hear the parties, the matter may be transferred by his order to some other judge.

History: En. Sec. 420, p. 129, Bannack Stat.; re-en. Sec. 489, p. 231, L. 1867; re-en. Sec. 569, p. 152, Cod. Stat. 1871; re-en. Sec. 472, p. 166, L. 1877; re-en. Sec. 472, 1st Div. Rev. Stat. 1879; re-en. Sec. 485, 1st Div. Comp. Stat. 1887; amd. Sec. 1823, C. Civ. Proc. 1895; re-en. Sec. 7142, Rev. C. 1907; re-en. Sec. 9775, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1006; re-en. Sec. 9775, R.C.M. 1935; R.C.M. 1947, 93-8404.

25-4-103. Vacating or modifying order made without notice. An order made out of court without notice to the adverse party may be vacated or modified, without notice, by the judge who made it, or it may be vacated or modified on notice in the manner in which other motions are made.

History: En. Sec. 249, p. 94, Bannack Stat.; re-en. Sec. 318, p. 199, L. 1867; re-en. Sec. 367, p. 107, Cod. Stat. 1871; re-en. Sec. 406, p. 149, L. 1877; re-en. Sec. 406, 1st Div. Rev. Stat. 1879; re-en. Sec. 419, 1st Div. Comp. Stat. 1887; re-en. Sec. 1824, C. Civ. Proc. 1895; re-en. Sec. 7143, Rev. C. 1907; re-en. Sec. 9776, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 937; re-en. Sec. 9776, R.C.M. 1935; R.C.M. 1947, 93-8405.

25-4-104 through 25-4-110 reserved.

25-4-111. Lost papers. If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original.

History: En. Sec. 1891, C. Civ. Proc. 1895; re-en. Sec. 7184, Rev. C. 1907; re-en. Sec. 9817, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1045; re-en. Sec. 9817, R.C.M. 1935; R.C.M. 1947, 93-8702.

25-4-112. Papers with technical defects. An affidavit, notice, or other paper without the title of the action or proceeding in which it is made or with a defective title is as valid and effectual for any purpose as if duly entitled if it intelligibly refers to such action or proceeding.

History: En. Sec. 424, p. 129, Bannack Stat.; re-en. Sec. 502, p. 233, L. 1867; re-en. Sec. 579, p. 153, Cod. Stat. 1871; re-en. Sec. 520, p. 177, L. 1877; re-en. Sec. 520, 1st Div. Rev. Stat. 1879; re-en. Sec. 537, 1st Div. Comp. Stat. 1887; re-en. Sec. 1892, C. Civ. Proc. 1895; re-en. Sec. 7185, Rev. C. 1907; re-en. Sec. 9818, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1046; re-en. Sec. 9818, R.C.M. 1935; R.C.M. 1947, 93-8703.

Part 2

Pleadings in General

25-4-201. Description of real property in complaint. In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it.

History: En. Sec. 100, p. 64, L. 1877; re-en. Sec. 100, 1st Div. Rev. Stat. 1879; re-en. Sec. 102, 1st Div. Comp. Stat. 1887; re-en. Sec. 744, C. Civ. Proc. 1895; re-en. Sec. 6570, Rev. C. 1907; re-en. Sec. 9168, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 455; re-en. Sec. 9168, R.C.M. 1935; R.C.M. 1947, 93-3805.

25-4-202. Copy of written instrument in pleading. The insertion in a pleading of a copy of a written instrument is equivalent to setting forth the instrument according to its legal effect.

History: En. Sec. 748, C. Civ. Proc. 1895; re-en. Sec. 6574, Rev. C. 1907; re-en. Sec. 9172, R.C.M. 1921; re-en. Sec. 9172, R.C.M. 1935; R.C.M. 1947, 93-3809.

25-4-203. Verification of pleadings. (1) In any case in which an affidavit of verification is required, except as otherwise specifically provided, such affidavit of verification must be to the effect that the pleading is true to the knowledge of the deponent, except as to the matters therein stated on information and belief, and that as to those he believes it to be true. Such verification must be made by the party or, if there are several parties united in interest or pleading, by one at least of such parties acquainted with the facts if such party is in the county and capable of making the affidavit. The verification may also be made by the agent or attorney of the party if the party is absent from the county where the attorney resides or is from any other cause unable to verify the pleading, and in such case the verification must state that the deponent is the agent or attorney of the party, the reason why such verification is made by such agent or attorney, and that the matters stated in the pleadings are true to the best knowledge, information, and belief of such agent or attorney.

(2) When a corporation is a party, the verification may be made by any officer thereof and must state what officer he is and that the matters stated therein are true to the best knowledge, information, and belief of such officer. If there is no officer of the corporation within the county, the verification may be made by its attorney.

History: En. Sec. 55, p. 144, L. 1867; amd. Sec. 9, p. 64, L. 1869; amd. Sec. 63, p. 39, Cod. Stat. 1871; re-en. Sec. 94, p. 62, L. 1877; re-en. Sec. 94, 1st Div. Rev. Stat. 1879; re-en. Sec. 96, 1st Div. Comp. Stat. 1887; en. Sec. 731, C. Civ. Proc. 1895; re-en. Sec. 6565, Rev. C. 1907; re-en. Sec. 9163, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 446; re-en. Sec. 9163, R.C.M. 1935; amd. Sec. 1, Ch. 15, L. 1963; R.C.M. 1947, 93-3702.

25-4-204. Time for amendment or reply after motion on pleading. When a demurrer or motion to any pleading is sustained or overruled and time to amend, answer, or reply is given, the time so given runs from service of notice of the decision or order, except when the party against whom the decision is made is in court. In such case the time runs from the making of the decision or order.

History: En. Sec. 779, C. Civ. Proc. 1895; re-en. Sec. 6594, Rev. C. 1907; re-en. Sec. 9192, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 476; re-en. Sec. 9192, R.C.M. 1935; amd. Sec. 2, Ch. 8, L. 1937; R.C.M. 1947, 93-3910.

Part 3

Pleading Special Matters

25-4-301. Pleading statute of limitations. In pleading the statute of limitations, it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section .... (giving the number of the section and subsection thereof, if it is so divided, relied upon). If such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred.

History: En. Sec. 103, p. 64, L. 1877; re-en. Sec. 103, 1st Div. Rev. Stat. 1879; re-en. Sec. 105, 1st Div. Comp. Stat. 1887; re-en. Sec. 749, C. Civ. Proc. 1895; re-en. Sec. 6575, Rev. C. 1907; re-en. Sec. 9173, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 458; re-en. Sec. 9173, R.C.M. 1935; R.C.M. 1947, 93-3810.

25-4-302. Pleading an account. It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within 5 days or such further time as the court may allow or may be agreed to by the parties, after a demand thereof in writing, a copy of the account or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general or is defective in any particular.

History: En. Sec. 55, p. 53, Bannack Stat.; amd. Sec. 56, p. 145, L. 1867; re-en. Sec. 64, p. 40, Cod. Stat. 1871; re-en. Sec. 99, p. 64, L. 1877; re-en. Sec. 99, 1st Div. Rev. Stat. 1879; re-en. Sec. 101, 1st Div. Comp. Stat. 1887; amd. Sec. 743,

C. Civ. Proc. 1895; re-en. Sec. 6569, Rev. C. 1907; re-en. Sec. 9167, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 454; re-en. Sec. 9167, R.C.M. 1935; R.C.M. 1947, 93-3804.

25-4-303. True value of property — action for taking. When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property and the officer taking the property or the sureties on any bond or undertaking are sued for taking the same, the officer or sureties may, in their answer, set up the true value of the property and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made or that the value in the affidavit stated was inserted by mistake, whereupon the court must disregard the value as stated in the affidavit.

History: En. Sec. 115, p. 67, L. 1877; re-en. Sec. 115, 1st Div. Rev. Stat. 1879; re-en. Sec. 117, 1st Div. Comp. Stat. 1887; amd. Sec. 775, C. Civ. Proc. 1895; re-en. Sec. 6590, Rev. C. 1907; re-en. Sec. 9188, R.C.M. 1921; re-en. Sec. 9188, R.C.M. 1935; R.C.M. 1947, 93-3906.

25-4-304 through 25-4-310 reserved.

25-4-311. Damages for personal injury or wrongful death not to be stated. In an action for the recovery of money or damages for personal injury or wrongful death, the amount thereof may not be stated in the claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim.

History: En. 93-2721 by Sec. 1, Ch. 525, L. 1977; R.C.M. 1947, 93-2721.

25-4-312. Request for statement of damages — response. When an action is filed in the district court to recover damages for personal injury or wrongful death, the parties against whom the action is brought may at any time request a statement setting forth the nature and amount of damages being sought. The request shall be filed and served upon the claimant, who shall file and serve a responsive statement as to damages within 15 days thereafter. In the event that a response is not served, the party, on notice to the claimant, may petition the court in which the action is pending to order the claimant to serve a responsive statement.

History: En. 93-2722 by Sec. 2, Ch. 525, L. 1977; R.C.M. 1947, 93-2722.

25-4-313. Notice to defendant when no request for statement. If no request is made for such a statement setting forth the nature and amount of damages being sought, the claimant shall give notice to the defendant of the amount of special and general damages sought to be recovered:

(1) before a default may be taken; or

(2) in the event an answer is filed, at least 45 days prior to the date set for the trial.

History: En. 93-2723 by Sec. 3, Ch. 525, L. 1977; R.C.M. 1947, 93-2723.

25-4-314. Permissive delivery of statement with summons. A copy of the statement setting forth the nature and amount of damages being sought may be delivered to the defendant at the time of service of the summons and complaint but may not be filed for 20 days after the complaint is filed.

History: En. 93-2724 by Sec. 4, Ch. 525, L. 1977; R.C.M. 1947, 93-2724.

Part 4

Counterclaim and Cross-Claim

25-4-401. Counterclaim by person sued in representative capacity. In an action against an executor or administrator or other person sued in a representative capacity, the defendant may set forth as a counterclaim a demand belonging to the decedent or other person whom he represents where the person so represented would have been entitled to set forth the same in an action against him.

History: En. Sec. 695, C. Civ. Proc. 1895; re-en. Sec. 6545, Rev. C. 1907; re-en. Sec. 9142, R.C.M. 1921; re-en. Sec. 9142, R.C.M. 1935; R.C.M. 1947, 93-3406.

25-4-402. Counterclaim against person suing in representative capacity. In an action brought by an executor or administrator in his representative capacity, a demand against the decedent belonging at the time of his death to the defendant may be set forth by the defendant as a counterclaim as if the action had been brought by the decedent in his lifetime, and if a balance is found to be due the defendant, judgment must be rendered therefor against the plaintiff in his representative capacity. Execution can be issued upon such a judgment only in a case where it could be issued upon a judgment in an action against the executor or administrator.

History: En. Sec. 696, C. Civ. Proc. 1895; re-en. Sec. 6546, Rev. C. 1907; re-en. Sec. 9143, R.C.M. 1921; re-en. Sec. 9143, R.C.M. 1935; R.C.M. 1947, 93-3407.

25-4-403. Counterclaim in action on contract. A counterclaim on a contract is subject to the following rules:

(1) Except as otherwise provided by the Uniform Commercial Code, if the action is founded upon a contract which has been assigned by the party thereto, a demand existing against the party thereto or an assignee of the contract at the time of the assignment thereof and belonging to the defendant, in good faith, before notice of the assignment must be allowed as a counterclaim to the amount of the plaintiff's demand if it might have been so allowed against the party or the assignee while the contract belonged to him.

(2) If the plaintiff is a trustee for another or if the action is in the name of the plaintiff who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counterclaim, but so much of a demand existing against the person whom he represents or for whose benefit the action is brought as will satisfy the plaintiff's demand must be allowed as a counterclaim if it might have been so allowed in an action brought by the person beneficially interested.

History: En. Sec. 692, C. Civ. Proc. 1895; re-en. Sec. 6542, Rev. C. 1907; re-en. Sec. 9139, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 438; re-en. Sec. 9139, R.C.M. 1935; amd. Sec. 11-158, Ch. 264, L. 1963; R.C.M. 1947, 93-3403.

25-4-404. Cross-claim to be asserted in answer. Where the judgment may determine the ultimate rights of two or more defendants as between themselves, a defendant who requires such a determination must demand it in his answer. The controversy between the defendants must not delay a judgment to which the plaintiff is entitled unless the court otherwise directs.

History: En. Sec. 753, C. Civ. Proc. 1895; re-en. Sec. 6579, Rev. C. 1907; re-en. Sec. 9177, R.C.M. 1921; re-en. Sec. 9177, R.C.M. 1935; R.C.M. 1947, 93-3814.

Part 5

Motion to Postpone Trial

25-4-501. Motion to postpone trial for absence of testimony. A motion to postpone a trial on grounds of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained and that due diligence has been used to procure it.

History: En. Sec. 130, p. 69, Bannack Stat.; re-en. Sec. 158, p. 163, L. 1867; en. Sec. 194, p. 65, Cod. Stat. 1871; re-en. Sec. 244, p. 98, L. 1877; re-en. Sec. 244, 1st Div. Rev. Stat. 1879; re-en. Sec. 253, 1st Div. Comp. Stat. 1887; re-en. Sec. 1039, C. Civ. Proc. 1895; re-en. Sec. 6729, Rev. C. 1907; re-en. Sec. 9332, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 595; re-en. Sec. 9332, R.C.M. 1935; R.C.M. 1947, 93-4910(part).

25-4-502. No postponement when expected evidence admitted. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain, and if the adverse party thereupon admits that such evidence would be given and that it be considered as actually given on the trial or offered and overruled as improper, the trial shall not be postponed.

History: En. Sec. 130, p. 69, Bannack Stat.; re-en. Sec. 158, p. 163, L. 1867; en. Sec. 194, p. 65, Cod. Stat. 1871; re-en. Sec. 244, p. 98, L. 1877; re-en. Sec. 244, 1st Div. Rev. Stat. 1879; re-en. Sec. 253, 1st Div. Comp. Stat. 1887; re-en. Sec. 1039, C. Civ. Proc. 1895; re-en. Sec. 6729, Rev. C. 1907; re-en. Sec. 9332, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 595; re-en. Sec. 9332, R.C.M. 1935; R.C.M. 1947, 93-4910(part).

25-4-503. Postponement on other grounds. Upon terms the court may, in its discretion, upon good cause shown and in furtherance of justice, postpone a trial or proceeding upon other grounds than the absence of evidence.

History: En. Sec. 130, p. 69, Bannack Stat.; re-en. Sec. 158, p. 163, L. 1867; en. Sec. 194, p. 65, Cod. Stat. 1871; re-en. Sec. 244, p. 98, L. 1877; re-en. Sec. 244, 1st Div. Rev. Stat. 1879; re-en. Sec. 253, 1st Div. Comp. Stat. 1887; re-en. Sec. 1039, C. Civ. Proc. 1895; re-en. Sec. 6729, Rev. C. 1907; re-en. Sec. 9332, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 595; re-en. Sec. 9332, R.C.M. 1935; R.C.M. 1947, 93-4910(part).

25-4-504. Depositions of witnesses upon postponement. The party obtaining a postponement of a trial in any court of record must, if required by the adverse party, consent that the testimony of any witness of such adverse party who is in attendance be then taken by deposition before a judge or clerk of the court in which the case is pending or before such notary public as the court may indicate, which must accordingly be done, and the testimony so taken may be read on the trial with the same effect and subject to the same objections as if the witnesses were produced.

History: En. Sec. 447, p. 133, Bannack Stat.; re-en. Sec. 604, p. 158, Cod. Stat. 1871; re-en. Sec. 245, p. 99, L. 1877; re-en. Sec. 245, 1st Div. Rev. Stat. 1879; re-en. Sec. 254, 1st Div. Comp. Stat. 1887; amd. Sec. 1040, C. Civ. Proc. 1895; re-en. Sec. 6730, Rev. C. 1907; re-en. Sec. 9333, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 596; re-en. Sec. 9333, R.C.M. 1935; R.C.M. 1947, 93-4911.

Part 6

Procedure After Claims Partially Admitted

25-4-601. Procedure when answer admits part of plaintiff's claim. Where the answer of the defendant, expressly or by not denying, admits a part of the plaintiff's claim to be just, the court, upon the plaintiff's motion, may, in its discretion, order that the action be severed, that a judgment be entered for the plaintiff for the part so admitted, and if the plaintiff so elects, that the action be continued with like effect as to the subsequent proceedings as if it had been originally brought for the remainder of the claim. The order must prescribe the time and manner of the plaintiff's election. If the plaintiff elects to continue the action, his right to costs upon the judgment is the same as if it were taken in an action brought for only that part of the claim. If the plaintiff does not elect to continue the action, costs must be awarded as upon final judgment in any other case.

History: En. Sec. 702, C. Civ. Proc. 1895; re-en. Sec. 6552, Rev. C. 1907; re-en. Sec. 9149, R.C.M. 1921; re-en. Sec. 9149, R.C.M. 1935; R.C.M. 1947, 93-3413.

25-4-602. Judgment for excess when plaintiff admits counterclaim. In an action upon contract where the complaint demands judgment for a sum of money only, if the defendant by his answer does not deny the plaintiff's claim but sets up a counterclaim amounting to less than the plaintiff's claim, the plaintiff, upon filing with the clerk an admission of the counterclaim, may take judgment for the excess, as upon a default for want of an answer. The admission must be made a part of the judgment roll.

History: En. Sec. 703, C. Civ. Proc. 1895; re-en. Sec. 6553, Rev. C. 1907; re-en. Sec. 9150, R.C.M. 1921; re-en. Sec. 9150, R.C.M. 1935; R.C.M. 1947, 93-3414.

CHAPTER 5

PARTIES

Part 1 — Designation of Parties

Section
25-5-101. Names of parties.
25-5-102. Use of abbreviated names.
25-5-103. Suing a party by a fictitious name.
25-5-104. Action against business association.

Part 2 — Capacity to Be a Party—Joinder

25-5-201. Capacity of married person to be a party.
25-5-202. Who may defend when spouse sued.
25-5-203. Defendants — adverse claims to real property.
25-5-204. Joinder of state as defendant in actions affecting title to property.

Part 1

Designation of Parties

25-5-101. Names of parties. In a civil action, the party complaining is known as the plaintiff and the adverse party as the defendant. The party prosecuting a special proceeding may be known as the plaintiff and the adverse party as the defendant.

History: Ap. p. Sec. 2, p. 43, Bannack Stat.; re-en. Sec. 2, p. 136, L. 1867; re-en. Sec. 2, p. 28, Cod. Stat. 1871; re-en. Sec. 2, p. 40, L. 1877; re-en. Sec. 2, 1st Div.

Rev. Stat. 1879; re-en. Sec. 2, 1st Div. Comp. Stat. 1887; re-en. Sec. 461, C. Civ. Proc. 1895; re-en. Sec. 6426, Rev. C. 1907; re-en. Sec. 9009, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 308; re-en. Sec. 9009, R.C.M. 1935; Sec. 93-2302, R.C.M. 1947; Ap. p. Sec. 1930, C. Civ. Proc. 1895; re-en. Sec. 7200, Rev. C. 1907; re-en. Sec. 9834, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1063; re-en. Sec. 9834, R.C.M. 1935; Sec. 93-8801, R.C.M. 1947; R.C.M. 1947, 93-2302, 93-8801.

25-5-102. Use of abbreviated names. It is sufficient in all actions, papers, pleadings, or proceedings to designate any party or person by the initial letter or letters or some contraction of the first name or names, instead of stating the first name in full.

History: En. Sec. 68, p. 55, Bannack Stat.; re-en. Sec. 69, p. 147, L. 1867; re-en. Sec. 77, p. 42, Cod. Stat. 1871; re-en. Sec. 116, p. 67, L. 1877; re-en. Sec. 116, 1st Div. Rev. Stat. 1879; en. Sec. 1, p. 55, L. 1885; re-en. Sec. 118, 1st Div. Comp. Stat. 1887; re-en. Sec. 777, C. Civ. Proc. 1895; re-en. Sec. 6592, Rev. C. 1907; re-en. Sec. 9190, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 474; re-en. Sec. 9190, R.C.M. 1935; R.C.M. 1947, 93-3908(part).

25-5-103. Suing a party by a fictitious name. When the plaintiff is ignorant of the name of the defendant, such defendant may be designated in any pleading or proceeding by any name; and when his true name is discovered, the pleadings or proceedings may be amended accordingly.

History: En. Sec. 68, p. 55, Bannack Stat.; re-en. Sec. 69, p. 147, L. 1867; re-en. Sec. 77, p. 42, Cod. Stat. 1871; re-en. Sec. 116, p. 67, L. 1877; re-en. Sec. 116, 1st Div. Rev. Stat. 1879; en. Sec. 1, p. 55, L. 1885; re-en. Sec. 118, 1st Div. Comp. Stat. 1887; re-en. Sec. 777, C. Civ. Proc. 1895; re-en. Sec. 6592, Rev. C. 1907; re-en. Sec. 9190, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 474; re-en. Sec. 9190, R.C.M. 1935; R.C.M. 1947, 93-3908(part).

25-5-104. Action against business association. When two or more persons associated in any business transact such business under a common name, whether it comprise the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates in the same manner as if all had been named defendants and had been sued upon their joint liability.

History: En. Sec. 439, p. 132, Bannack Stat.; re-en. Sec. 596, p. 157, Cod. Stat. 1871; amd. Sec. 25, p. 44, L. 1877; re-en. Sec. 25, 1st Div. Rev. Stat. 1879; re-en. Sec. 25, 1st Div. Comp. Stat. 1887; re-en. Sec. 590, C. Civ. Proc. 1895; re-en. Sec. 6497, Rev. C. 1907; re-en. Sec. 9089, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 388; re-en. Sec. 9089, R.C.M. 1935; R.C.M. 1947, 93-2827.

Part 2

Capacity to Be a Party — Joinder

25-5-201. Capacity of married person to be a party. A married person may sue and be sued in the same manner as if such person were sole.

History: En. Sec. 7, 1st Div. Comp. Stat. 1887; re-en. Sec. 572, C. Civ. Proc. 1895; re-en. Sec. 6479, Rev. C. 1907; re-en. Sec. 9069, R.C.M. 1921; re-en. Sec. 9069, R.C.M. 1935; amd. Sec. 48, Ch. 535, L. 1975; R.C.M. 1947, 93-2803.

25-5-202. Who may defend when spouse sued. If a husband and wife be sued together, each spouse may defend for his or her own right, and if the other spouse neglect to defend, the spouse who does choose to defend may defend for the other spouse's right also.

History: En. Sec. 8, p. 44, Bannack Stat.; re-en. Sec. 8, p. 136, L. 1867; re-en. Sec. 8, p. 28, Cod. Stat. 1871; amd. Sec. 8, p. 41, L. 1877; re-en. Sec. 8, 1st Div. Rev. Stat. 1879; re-en. Sec. 8, 1st Div. Comp. Stat. 1887; re-en. Sec. 573, C. Civ. Proc. 1895; re-en. Sec. 6480, Rev. C. 1907; re-en. Sec. 9070, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 371; re-en. Sec. 9070, R.C.M. 1935; amd. Sec. 49, Ch. 535, L. 1975; R.C.M. 1947, 93-2804.

25-5-203. Defendants — adverse claims to real property. In an action brought by a person out of possession of real property to determine an adverse claim of an interest or estate therein, the person making such adverse claim and the persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises as against the defendants in the action against whom the judgment has passed.

History: En. Sec. 17, p. 42, L. 1877; re-en. Sec. 17, 1st Div. Rev. Stat. 1879; re-en. Sec. 17, 1st Div. Comp. Stat. 1887; re-en. Sec. 582, C. Civ. Proc. 1895; re-en. Sec. 6489, Rev. C. 1907; re-en. Sec. 9081, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 380; re-en. Sec. 9081, R.C.M. 1935; R.C.M. 1947, 93-2817.

25-5-204. Joinder of state as defendant in actions affecting title to property. In any action or proceeding brought in any district court of the state affecting the title to real or personal property in which the state has or claims to have an interest or claim, the state may be made a party defendant to such action or proceeding and its rights or interests adjudicated.

History: En. Sec. 1, Ch. 210, L. 1921; re-en. Sec. 9079, R.C.M. 1921; amd. Sec. 1, Ch. 65, L. 1931; re-en. Sec. 9079, R.C.M. 1935; amd. Sec. 8, Ch. 234, L. 1977; R.C.M. 1947, 93-2815.

CHAPTER 6

RESERVED

CHAPTER 7

TRIALS

Part 1 — Issues—Mode of Trial

Section

25-7-101. Issue defined, types of issues.
25-7-102. Issues of law to be decided by court.
25-7-103. When issues of fact to be decided by jury.
25-7-104. Mode of trial of counterclaim.

Part 2 — Selection of Jury

25-7-201. When a jury is to be selected.
25-7-202. Judge to draw capsules containing ballots.
25-7-203. Drawing a new jury when another is impaneled.
25-7-204. Mode of drawing capsules.
25-7-205. Persons drawn and approved to form jury.
25-7-206. Procedure when insufficient number attend.

25-7-207. Oath of jury.
25-7-208. Capsules containing ballots of jurors who have been sworn.
25-7-209. Capsules containing ballots of jurors not sworn.
Sections 25-7-210 through 25-7-220 reserved.
25-7-221. Challenges to jurors and the jury.
25-7-222. Challenges to the array or panel.
25-7-223. Challenges to jurors for cause.
25-7-224. Peremptory challenges to jurors.

Part 3 — Order and Conduct of Trial by Jury

25-7-301. Order of trial.
25-7-302. Directed verdict when no issues of fact.
25-7-303. Activity of court during jury's absence.
25-7-304. Procedure when a juror becomes sick.
25-7-305. Procedure when jury prevented from giving verdict.

Part 4 — Conduct of Jury

25-7-401. View by jury of the premises.
25-7-402. Admonition when jury permitted to separate.
25-7-403. Conduct of jury after case submitted to it.
25-7-404. Papers which may be taken into jury room.
25-7-405. Jury's request for further information.

Part 5 — Jury's Verdict

25-7-501. Return of verdict — polling the jury.
25-7-502. Content of verdict — action or counterclaim for recovery of money.
25-7-503. Content of verdict — action for recovery of personal property.

Part 6 — Trial by the Court

25-7-601. Waiver of findings of fact.
25-7-602. Trial upon agreed statement of facts.

Part 7 — Referees

25-7-701. Oath of referee.
25-7-702. Grounds for objection to appointment of referee.
25-7-703. Procedure upon objection.

Part 1

Issues — Mode of Trial

25-7-101. Issue defined, types of issues. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:

(1) of law; and
(2) of fact.

History: En. Sec. 123, p. 68, Bannack Stat.; re-en. Sec. 151, p. 163, L. 1867; re-en. Sec. 187, p. 64, Cod. Stat. 1871; re-en. Sec. 237, p. 98, L. 1877; re-en. Sec. 237, 1st Div. Rev. Stat. 1879; re-en. Sec. 246, 1st Div. Comp. Stat. 1887; amd. Sec. 1030, C. Civ. Proc. 1895; re-en. Sec. 6720, Rev. C. 1907; re-en. Sec. 9323, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 588; re-en. Sec. 9323, R.C.M. 1935; R.C.M. 1947, 93-4901.

25-7-102. Issues of law to be decided by court. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the court unless they are referred upon consent, and all discussions of law are to be addressed to the court.

History: Ap. p. Sec. 3441, C. Civ. Proc. 1895; re-en. Sec. 8055, Rev. C. 1907; re-en. Sec. 10699, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2102; re-en. Sec. 10699, R.C.M. 1935; Sec. 93-2501-2, R.C.M. 1947; Ap. p. Sec. 126, p. 68, Bannack Stat.; amd. Sec. 154, p. 163, L. 1867; re-en. Sec. 190, p. 64, Cod. Stat. 1871; re-en. Sec. 240, p. 98, L. 1877; re-en. Sec. 240, 1st Div. Rev. Stat. 1879; re-en. Sec. 249, 1st Div. Comp. Stat. 1887; re-en. Sec. 1032, C. Civ. Proc. 1895; re-en. Sec. 6722, Rev. C. 1907; re-en. Sec. 9325, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 591; re-en. Sec. 9325, R.C.M. 1935; Sec. 93-4903, R.C.M. 1947; R.C.M. 1947, 93-4903, 93-2501-2(part).

25-7-103. When issues of fact to be decided by jury. All questions of fact, where the trial is by jury, other than those mentioned in 25-7-102 are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this code.

History: En. Sec. 3440, C. Civ. Proc. 1895; re-en. Sec. 8054, Rev. C. 1907; re-en. Sec. 10698, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2101; re-en. Sec. 10698, R.C.M. 1935; R.C.M. 1947, 93-2501-1.

25-7-104. Mode of trial of counterclaim. Where the defendant interposes a counterclaim and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact arising thereupon is the same as if it arose in an action brought by the defendant against the plaintiff for the cause of action stated in the counterclaim and demanding the same judgment.

History: En. Sec. 1036, C. Civ. Proc. 1895; re-en. Sec. 6726, Rev. C. 1907; re-en. Sec. 9329, R.C.M. 1921; re-en. Sec. 9329, R.C.M. 1935; R.C.M. 1947, 93-4907.

Part 2

Selection of Jury

25-7-201. When a jury is to be selected. The procedure in this part for selecting a jury must be pursued as often as an issue is brought to trial by a jury.

History: En. Sec. 1054, C. Civ. Proc. 1895; re-en. Sec. 6735, Rev. C. 1907; amd. Sec. 13, Ch. 35, L. 1919; re-en. Sec. 9338, R.C.M. 1921; re-en. Sec. 9338, R.C.M. 1935; R.C.M. 1947, 93-5005(part).

25-7-202. Judge to draw capsules containing ballots. When an issue of fact to be tried by a jury is brought to trial, the district judge in the presence of the clerk of the court must openly draw out of the trial juror box as many of the capsules containing ballots with the names of jurors thereon, one after another, as are sufficient to form a jury.

History: En. Sec. 1050, C. Civ. Proc. 1895; re-en. Sec. 6731, Rev. C. 1907; amd. Sec. 10, Ch. 35, L. 1919; re-en. Sec. 9334, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 600; re-en. Sec. 9334, R.C.M. 1935; amd. Sec. 3, Ch. 151, L. 1937; amd. Sec. 3, Ch. 3, L. 1939; R.C.M. 1947, 93-5001.

25-7-203. Drawing a new jury when another is impaneled. If an issue is brought to trial by a jury while a jury is impaneled in another cause and not then discharged, the court may order a jury for the trial of that issue to be drawn out of the box containing the capsules then undrawn; but in any other case the capsules containing the ballots with the names of all the trial jurors returned and attending the court must be placed together in the same box before a jury is drawn therefrom.

History: En. Sec. 1056, C. Civ. Proc. 1895; re-en. Sec. 6737, Rev. C. 1907; amd. Sec. 15, Ch. 35, L. 1919; re-en. Sec. 9340, R.C.M. 1921; re-en. Sec. 9340, R.C.M. 1935; R.C.M. 1947, 93-5007.

25-7-204. Mode of drawing capsules. Before the first capsule containing a ballot shall have been drawn, the box must be closed and well shaken so as to thoroughly mix the capsules therein. The district judge must draw a capsule containing a ballot with the juror's name thereon through an aperture made in the lid large enough only to admit his hand conveniently and without said judge gazing into said box before or while drawing said capsule.

History: En. Sec. 1051, C. Civ. Proc. 1895; re-en. Sec. 6732, Rev. C. 1907; amd. Sec. 11, Ch. 35, L. 1919; re-en. Sec. 9335, R.C.M. 1921; re-en. Sec. 9335, R.C.M. 1935; amd. Sec. 4, Ch. 151, L. 1937; amd. Sec. 4, Ch. 3, L. 1939; R.C.M. 1947, 93-5002.

25-7-205. Persons drawn and approved to form jury. The first 12 persons who appear, as their names are drawn and called, and are approved as indifferent between the parties and not discharged or excused must be sworn and constitute the jury to try the issue.

History: En. Sec. 1052, C. Civ. Proc. 1895; re-en. Sec. 6733, Rev. C. 1907; re-en. Sec. 9336, R.C.M. 1921; re-en. Sec. 9336, R.C.M. 1935; R.C.M. 1947, 93-5003.

25-7-206. Procedure when insufficient number attend. (1) If a sufficient number of jurors duly drawn and notified do not attend to form a jury, the district judge shall, pursuant to an order to be entered in the minutes, in the presence of the clerk of the court draw a sufficient number of ballots from the box to complete the jury. The sheriff shall notify the persons thus drawn to attend immediately or at a time fixed by court. If for any reason a sufficient number of jurors to try the issue is not obtained from the persons notified under an order made as prescribed in this section, the court may make another order or successive orders until a sufficient number is obtained.

(2) Each person so notified must attend at the time required by the notice and, unless excused by the court or set aside, must serve as a juror upon the trial. For a neglect or refusal to do so, he may be fined in the same manner as any other trial juror regularly drawn and notified. He is subject to the same exceptions and challenges as any other trial juror.

History: En. Sec. 1057, C. Civ. Proc. 1895; re-en. Sec. 6738, Rev. C. 1907; re-en. Sec. 9341, R.C.M. 1921; re-en. Sec. 9341, R.C.M. 1935; amd. Sec. 5, Ch. 151, L. 1937; amd. Sec. 5, Ch. 3, L. 1939; amd. Sec. 46, Ch. 344, L. 1977; R.C.M. 1947, 93-5008.

25-7-207. Oath of jury. As soon as the jury is completed, an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between ...., the plaintiff, and ...., the defendant, and render a true verdict according to the evidence.

History: En. Sec. 132, p. 69, Bannack Stat.; re-en. Sec. 160, p. 164, L. 1867; re-en. Sec. 196, p. 66, Cod. Stat. 1871; re-en. Sec. 247, p. 100, L. 1877; re-en. Sec. 247, 1st Div. Rev. Stat. 1879; re-en. Sec. 256, 1st Div. Comp. Stat. 1887; amd.

Sec. 1064, C. Civ. Proc. 1895; re-en. Sec. 6745, Rev. C. 1907; re-en. Sec. 9348, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 604; R.C.M. 1947, 93-5015.

25-7-208. Capsules containing ballots of jurors who have been sworn. The capsules containing the ballots with the names of the jurors so sworn must be then deposited in another box and there kept apart from the other capsules containing ballots with the names of jurors until that jury is discharged. After the jury is discharged, the capsules containing the ballots with the names of the jurors thereon must be returned to the box from which they were first taken.

History: Ap. p. Sec. 1053, C. Civ. Proc. 1895; re-en. Sec. 6734, Rev. C. 1907; amd. Sec. 12, Ch. 35, L. 1919; re-en. Sec. 9337, R.C.M. 1921; re-en. Sec. 9337, R.C.M. 1935; Sec. 93-5004, R.C.M. 1947; Ap. p. Sec. 1054, C. Civ. Proc. 1895; re-en. Sec. 6735, Rev. C. 1907; amd. Sec. 13, Ch. 35, L. 1919; re-en. Sec. 9338, R.C.M. 1921; re-en. Sec. 9338, R.C.M. 1935; Sec. 93-5005, R.C.M. 1947; R.C.M. 1947, 93-5004, 93-5005(part).

25-7-209. Capsules containing ballots of jurors not sworn. The capsule containing the ballot with the name of a juror who is absent when his name is drawn or called or is set aside or excused from serving on that trial must be again returned to the box containing the undrawn capsules as soon as the jury is sworn.

History: En. Sec. 1055, C. Civ. Proc. 1895; re-en. Sec. 6736, Rev. C. 1907; amd. Sec. 14, Ch. 35, L. 1919; re-en. Sec. 9339, R.C.M. 1921; re-en. Sec. 9339, R.C.M. 1935; R.C.M. 1947, 93-5006.

25-7-210 through 25-7-220 reserved.

25-7-221. Challenges to jurors and the jury. (1) Each party may challenge the jury or jurors as follows:

(a) the panel or array;
(b) for cause;
(c) peremptory.

(2) Challenges to individual jurors are for cause or peremptory.

History: En. Sec. 133, p. 69, Bannack Stat.; re-en. Sec. 161, p. 164, L. 1867; amd. Sec. 197, p. 66, Cod. Stat. 1871; amd. Sec. 248, p. 100, L. 1877; amd. Sec. 248, 1st Div. Rev. Stat. 1879; re-en. Sec. 257, 1st Div. Comp. Stat. 1887; re-en. Sec. 1059, C. Civ. Proc. 1895; re-en. Sec. 6740, Rev. C. 1907; re-en. Sec. 9343, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 301; re-en. Sec. 9343, R.C.M. 1935; amd. Sec. 1, Ch. 300, L. 1971; R.C.M. 1947, 93-5010(part).

25-7-222. Challenges to the array or panel. (1) A challenge to the array or panel may be made and the whole array or panel set aside by the court when the jury was not selected, drawn, summoned, or notified as prescribed by law. It is not a valid objection to a jury that it contains none of the jurors originally returned to the court or is only partially composed of such jurors.

(2) There can be only one challenge on a side to the array or panel, which may be made by one or more of the parties.

History: Ap. p. Sec. 1058, C. Civ. Proc. 1895; re-en. Sec. 6739, Rev. C. 1907; re-en. Sec. 9342, R.C.M. 1921; re-en. Sec. 9342, R.C.M. 1935; Sec. 93-5009, R.C.M. 1947; Ap. p. Sec. 133, p. 69, Bannack Stat.; re-en. Sec. 161, p. 164, L. 1867; amd. Sec. 197, p. 66, Cod. Stat. 1871; amd. Sec. 248, p. 100, L. 1877; amd. Sec. 248, 1st Div. Rev. Stat. 1879; re-en. Sec. 257, 1st Div. Comp. Stat. 1887; re-en. Sec. 1059, C. Civ. Proc. 1895; re-en. Sec. 6740, Rev. C. 1907; re-en. Sec. 9343, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 301; re-en. Sec. 9343, R.C.M. 1935; amd. Sec. 1, Ch. 300, L. 1971; Sec. 93-5010, R.C.M. 1947; R.C.M. 1947, 93-5009, 93-5010(part).

25-7-223. Challenges to jurors for cause. Challenges for cause may be taken on one or more of the following grounds:

(1) a want of any of the qualifications prescribed by this code to render a person competent as a juror;

(2) consanguinity or affinity within the sixth degree to any party;

(3) standing in the relation of guardian and ward, master and servant, debtor and creditor, employer and clerk, or principal and agent to either party or being a member of the family of either party or a partner in business with either party or surety on any bond or obligation for either party. However, a challenge for cause may not be taken because of debtor and creditor relation when the same arises solely by reason of current bills of gas, water, electricty, or telephone.

(4) having served as a juror or been a witness on a previous trial between the same parties for the same cause of action;

(5) interest on the part of the juror in the event of the action or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation;

(6) having an unqualified opinion or belief as to the merits of the action;

(7) the existence of a state of mind in the juror evincing enmity against or bias in favor of either party.

History: En. Sec. 134, p. 70, Bannack Stat.; re-en. Sec. 162, p. 164, L. 1867; re-en. Sec. 198, p. 66, Cod. Stat. 1871; re-en. Sec. 249, p. 100, L. 1877; re-en. Sec. 249, 1st Div. Rev. Stat. 1879; re-en. Sec. 258, 1st Div. Comp. Stat. 1887; amd. Sec. 1060, C. Civ. Proc. 1895; re-en. Sec. 6741, Rev. C. 1907; re-en. Sec. 9344, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 602; re-en. Sec. 9344, R.C.M. 1935; amd. Sec. 1, Ch. 10, L. 1953; R.C.M. 1947, 93-5011.

25-7-224. Peremptory challenges to jurors. (1) Each party is entitled to four peremptory challenges, except as provided for under subsection (2). If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff.

(2) Where a six-person jury is authorized by law, each side shall have two peremptory challenges. They shall be exercised by the plaintiff first striking one and the defendant then striking one, and so on until each side has exhausted or waived his rights.

History: (1)En. Sec. 133, p. 69, Bannack Stat.; re-en. Sec. 161, p. 164, L. 1867; amd. Sec. 197, p. 66, Cod. Stat. 1871; amd. Sec. 248, p. 100, L. 1877; amd. Sec. 248, 1st Div. Rev. Stat. 1879; re-en. Sec. 257, 1st Div. Comp. Stat. 1887; re-en. Sec. 1059, C. Civ. Proc. 1895; re-en. Sec. 6740, Rev. C. 1907; re-en. Sec. 9343, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 301; re-en. Sec. 9343, R.C.M. 1935; amd. Sec. 1, Ch. 300, L. 1971; Sec. 93-5010, R.C.M. 1947; (2)En. Sec. 224, C. Civ. Proc. 1895; re-en. Sec. 6334, Rev. C. 1907; re-en. Sec. 8887, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 194; re-en. Sec. 8887, R.C.M. 1935; amd. Sec. 4, Ch. 203, L. 1939; amd. Sec. 1, Ch. 293, L. 1971; Sec. 93-1205, R.C.M. 1947; R.C.M. 1947, 93-1205(part), 93-5010(part).

Part 3

Order and Conduct of Trial by Jury

25-7-301. Order of trial. When the jury has been sworn, the trial shall proceed in the following order unless the court, for good cause and special reason, otherwise directs:

(1) The party on whom rests the burden of the issues may briefly state his case and the evidence by which he expects to sustain it.

(2) The adverse party may then, or at the opening of his case, briefly state his defense and the evidence he expects to offer in support of it.

(3) The party on whom rests the burden of the issues must first produce his evidence; the adverse party will then produce his evidence.

(4) The parties will then be confined to rebutting evidence unless the court, for good reasons in furtherance of justice, permits them to offer evidence in their original case.

(5) When the instructions have been passed upon and settled by the court and before the arguments of counsel to the jury have begun, the court shall charge the jury in writing, giving in such charge only such instructions as are passed upon and settled at such settlement. In charging the jury, the court shall give to it all matters of law which the court thinks necessary for the jury's information in rendering a verdict.

(6) When the jury has been charged, unless the case is submitted to the jury on either side or on both sides without argument, the party upon whom rests the burden of proof must commence and may conclude the argument. If several defendants having several defenses appear by different counsel, the court must determine their relative order in the evidence and argument. Counsel, in arguing the case to the jury, may argue and comment upon the law of the case as given in the instructions of the court, as well as upon the evidence in the case.

History: En. Sec. 1, Ch. 34, L. 1907; Sec. 6746, Rev. C. 1907; re-en. Sec. 9349, R.C.M. 1921; Cal. C. Civ. Proc. Secs. 607, 608; re-en. Sec. 9349, R.C.M. 1935; amd. Sec. 84, Ch. 13, L. 1961; R.C.M. 1947, 93-5101.

25-7-302. Directed verdict when no issues of fact. Where, upon the trial of an issue by a jury, the case presents only questions of law, the judge may direct the jury to render a verdict in favor of the party entitled thereto.

History: En. Sec. 1104, C. Civ. Proc. Sec. 1895; re-en. Sec. 6761, Rev. C. 1907; re-en. Sec. 9364, R.C.M. 1921; re-en. Sec. 9364, R.C.M. 1935; R.C.M. 1947, 93-5205.

25-7-303. Activity of court during jury's absence. While the jury is absent, the court may adjourn from time to time in respect to other business, but it is nevertheless open for every purpose connected with the case submitted to the jury until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court in case of an agreement during a recess or adjournment for the day.

History: En. Sec. 142, p. 71, Bannack Stat.; re-en. Sec. 170, p. 166, L. 1867; re-en. Sec. 210, p. 68, Cod. Stat. 1871; re-en. Sec. 260, p. 103, L. 1877; re-en. Sec. 260, 1st Div. Rev. Stat. 1879; re-en. Sec. 269, 1st Div. Comp. Stat. 1887; amd. Sec. 1088, C. Civ. Proc. 1895; re-en. Sec. 6754, Rev. C. 1907; re-en. Sec. 9357, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 617; re-en. Sec. 9357, R.C.M. 1935; R.C.M. 1947, 93-5109.

25-7-304. Procedure when a juror becomes sick. If, after the impaneling of the jury and before verdict, a juror becomes sick so as to be unable to perform his duty, the court may order him to be discharged. In that case, the trial may proceed with the other jurors or another juror may be sworn and the trial may begin anew or the jury may be discharged and a new jury then or afterward impaneled.

History: En. Sec. 136, p. 70, Bannack Stat.; amd. Sec. 164, p. 165, L. 1867; re-en. Sec. 205, p. 68, Cod. Stat. 1871; re-en. Sec. 255, p. 103, L. 1877; re-en. Sec. 255, 1st Div. Rev. Stat. 1879; re-en. Sec. 264, 1st Div. Comp. Stat. 1887; re-en. Sec. 1086, C. Civ. Proc. 1895; re-en. Sec. 6752, Rev. C. 1907; re-en. Sec. 9355, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 615; re-en. Sec. 9355, R.C.M. 1935; R.C.M. 1947, 93-5107.

25-7-305. Procedure when jury prevented from giving verdict. In all cases where the jury is discharged or prevented from giving a verdict by reason of accident or other cause during the progress of the trial or after the case is submitted to it, the action may be again tried immediately or at a future time, as the court may direct.

History: En. Sec. 141, p. 71, Bannack Stat.; amd. Sec. 169, p. 166, L. 1867; re-en. Sec. 209, p. 68, Cod. Stat. 1871; re-en. Sec. 259, p. 104, L. 1877; re-en. Sec. 259, 1st Div. Rev. Stat. 1879; re-en. Sec. 268, 1st Div. Comp. Stat. 1887; re-en. Sec. 1087, C. Civ. Proc. 1895; re-en. Sec. 6753, Rev. C. 1907; re-en. Sec. 9356, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 616; re-en. Sec. 9356, R.C.M. 1935; R.C.M. 1947, 93-5108.

Part 4

Conduct of Jury

25-7-401. View by jury of the premises. When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation or of the place at which any material fact occurred, it may order the jurors to be conducted in a body, under the charge of an officer and one person representing each party, to the place, which shall be shown to them by the persons appointed by the court for that purpose. While the jury is thus absent, no person other than the persons so appointed shall speak to it on any subject connected with the trial, and such persons shall not speak to the jury upon any matters connected with the subject of the action but may point out to the jury the property in litigation or the place at which any material fact occurred.

History: En. Sec. 204, p. 68, Cod. Stat. 1871; re-en. Sec. 254, p. 103, L. 1877; re-en. Sec. 254, 1st Div. Rev. Stat. 1879; re-en. Sec. 263, 1st Div. Comp. Stat. 1887; amd. Sec. 1081, C. Civ. Proc. 1895; re-en. Sec. 6747, Rev. C. 1907; re-en. Sec. 9350, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 610; re-en. Sec. 9350, R.C.M. 1935; R.C.M. 1947, 93-5102.

25-7-402. Admonition when jury permitted to separate. If the jurors are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by any other person on any subject of the trial and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

History: En. Sec. 263, p. 104, L. 1877; re-en. Sec. 263, 1st Div. Rev. Stat. 1879; re-en. Sec. 272, 1st Div. Comp. Stat. 1887; re-en. Sec. 1082, C. Civ. Proc. 1895; re-en. Sec. 6748, Rev. C. 1907; re-en. Sec. 9351, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 611; re-en. Sec. 9351, R.C.M. 1935; R.C.M. 1947, 93-5103.

25-7-403. Conduct of jury after case submitted to it. When the case is finally submitted to the jury, it may decide in court or retire for deliberation. If the jurors retire, they must be kept together in some convenient place, under charge of an officer, until at least two-thirds of them agree upon a verdict or are discharged by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them or make any himself, except to ask them if they or two-thirds of them are agreed upon a verdict; and he must not, before their verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

History: En. Sec. 138, p. 71, Bannack Stat.; re-en. Sec. 166, p. 165, L. 1867; re-en. Sec. 206, p. 68, Cod. Stat. 1871; re-en. Sec. 256, p. 103, L. 1877; re-en. Sec. 256, 1st Div. Rev. Stat. 1879; re-en. Sec. 265, 1st Div. Comp. Stat. 1887; amd. Sec. 1084, C. Civ. Proc. 1895; re-en. Sec. 6750, Rev. C. 1907; re-en. Sec. 9353,

R.C.M. 1921; Cal. C. Civ. Proc. Sec. 613; re-en. Sec. 9353, R.C.M. 1935; R.C.M. 1947, 93-5105.

25-7-404. Papers which may be taken into jury room. Upon retiring for deliberation, the jurors may take with them all papers which have been received as evidence in the cause except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them but none taken by any other person.

History: En. Sec. 139, p. 71, Bannack Stat.; re-en. Sec. 167, p. 166, L. 1867; amd. Sec. 207, p. 68, Cod. Stat. 1871; re-en. Sec. 257, p. 103, L. 1877; re-en. Sec. 257, 1st Div. Rev. Stat. 1879; re-en. Sec. 266, 1st Div. Comp. Stat. 1887; amd. Sec. 1083, C. Civ. Proc. 1895; re-en. Sec. 6749, Rev. C. 1907; re-en. Sec. 9352, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 612; re-en. Sec. 9352, R.C.M. 1935; R.C.M. 1947, 93-5104.

25-7-405. Jury's request for further information. After the jury has retired for deliberation, if there be a disagreement among the jurors as to any part of the testimony or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of or after notice to the parties or counsel. Such information must be given in writing or taken down by the stenographer.

History: En. Sec. 140, p. 71, Bannack Stat.; amd. Sec. 168, p. 166, L. 1867; re-en. Sec. 208, p. 68, Cod. Stat. 1871; re-en. Sec. 258, p. 103, L. 1877; re-en. Sec. 258, 1st Div. Rev. Stat. 1879; re-en. Sec. 267, 1st Div. Comp. Stat. 1887; amd. Sec. 1085, C. Civ. Proc. 1895; re-en. Sec. 6751, Rev. C. 1907; re-en. Sec. 9354, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 614; re-en. Sec. 9354, R.C.M. 1935; R.C.M. 1947, 93-5106.

Part 5

Jury's Verdict

25-7-501. Return of verdict — polling the jury. (1) When the jurors or two-thirds of them have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman. The verdict must be in writing and signed by the foreman and must be read by the clerk to the jury, and the inquiry made whether it is their verdict.

(2) Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict. If upon such inquiry or polling more than one-third of the jurors disagree thereto, the jury must be sent out again, but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case.

History: En. Sec. 143, p. 72, Bannack Stat.; re-en. Sec. 171, p. 166, L. 1867; re-en. Sec. 211, p. 69, Cod. Stat. 1871; amd. Sec. 261, p. 104, L. 1877; re-en. Sec. 261, 1st Div. Rev. Stat. 1879; re-en. Sec. 270, 1st Div. Comp. Stat. 1887; amd. Sec. 1089, C. Civ. Proc. 1895; re-en. Sec. 6755, Rev. C. 1907; re-en. Sec. 9358, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 618; re-en. Sec. 9358, R.C.M. 1935; R.C.M. 1947, 93-5110.

25-7-502. Content of verdict — action or counterclaim for recovery of money. When a verdict is found for the plaintiff in an action for the recovery of money or for the defendant when a counterclaim for the recovery of money is established exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery.

History: En. Sec. 149, p. 73, Bannack Stat.; re-en. Sec. 176, p. 167, L. 1867; re-en. Sec. 216, p. 70, Cod. Stat. 1871; re-en. Sec. 266, p. 105, L. 1877; re-en. Sec. 266, 1st Div. Rev. Stat. 1879; re-en. Sec. 276, 1st Div. Comp. Stat. 1887; amd. Sec. 1102, C. Civ. Proc. 1895; re-en. Sec. 6759, Rev. C. 1907; re-en. Sec. 9362, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 626; re-en. Sec. 9362, R.C.M. 1935; R.C.M. 1947, 93-5203.

25-7-503. Content of verdict — action for recovery of personal property. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff or the defendant, by his answer, claim a return thereof, the jury, if its verdict be in favor of the plaintiff or if, being in favor of the defendant, it also finds that he is entitled to a return thereof, shall find the value of the property (but failure to find all the facts mentioned in this section shall not invalidate the verdict) and may at the same time assess the damages, if they are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.

History: En. Sec. 150, p. 73, Bannack Stat.; re-en. Sec. 177, p. 167, L. 1867; re-en. Sec. 217, p. 70, Cod. Stat. 1871; re-en. Sec. 267, p. 105, L. 1877; re-en. Sec. 267, 1st Div. Rev. Stat. 1879; re-en. Sec. 277, 1st Div. Comp. Stat. 1887; re-en. Sec. 1103, C. Civ. Proc. 1895; re-en. Sec. 6760, Rev. C. 1907; re-en. Sec. 9363, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 627; re-en. Sec. 9363, R.C.M. 1935; R.C.M. 1947, 93-5204.

Part 6

Trial by the Court

25-7-601. Waiver of findings of fact. The findings of fact may be waived by the several parties to an issue of fact by:

(1) failing to appear at the trial;
(2) consent in writing filed with the clerk;
(3) oral consent in open court entered in the minutes.

History: En. Sec. 1113, C. Civ. Proc. 1895; re-en. Sec. 6765, Rev. C. 1907; re-en. Sec. 9368, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 634; re-en. Sec. 9368, R.C.M. 1935; R.C.M. 1947, 93-5304.

25-7-602. Trial upon agreed statement of facts. When any cause is tried and submitted upon a written statement of facts agreed to by the parties or their attorneys, such statement shall have the effect of a special verdict or finding of facts and judgment shall be pronounced thereon as upon a special verdict or finding of facts. In such case, no finding of facts shall be made unless such statement shall fail to embrace all the facts proved and in issue, in which case any additional fact may be found upon evidence which is not repugnant to the agreed statement.

History: En. Sec. 1117, C. Civ. Proc. 1895; re-en. Sec. 6769, Rev. C. 1907; re-en. Sec. 9372, R.C.M. 1921; re-en. Sec. 9372, R.C.M. 1935; R.C.M. 1947, 93-5308.

Part 7

Referees

25-7-701. Oath of referee. Every referee, before acting as such, shall take and subscribe an oath or affirmation before some authorized officer, which shall be filed with the clerk of the court by which he is appointed, that he will honestly, impartially, and faithfully perform the duties of referee in the action or matter referred to him, as required by law, to the best of his knowledge and ability.

History: En. Sec. 224, p. 72, Cod. Stat. 1871; re-en. Sec. 275, p. 108, L. 1877; re-en. Sec. 275, 1st Div. Rev. Stat. 1879; re-en. Sec. 285, 1st Div. Comp. Stat. 1887; re-en. Sec. 1133, C. Civ. Proc. 1895; re-en. Sec. 6774, Rev. C. 1907; re-en. Sec. 9377, R.C.M. 1921; re-en. Sec. 9377, R.C.M. 1935; R.C.M. 1947, 93-5404.

25-7-702. Grounds for objection to appointment of referee. Either party may object to the appointment of any person as referee on the same grounds that he might object to him as a trial juror, as provided in 25-7-223.

History: En. Sec. 185, p. 169, L. 1867; re-en. Sec. 225, p. 72, Cod. Stat. 1871; re-en. Sec. 276, p. 109, L. 1877; re-en. Sec. 276, 1st Div. Rev. Stat. 1879; re-en. Sec. 286, 1st Div. Comp. Stat. 1887; en. Sec. 1137, C. Civ. Proc. 1895; re-en. Sec. 6778, Rev. C. 1907; re-en. Sec. 9381, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 641; re-en. Sec. 9381, R.C.M. 1935; R.C.M. 1947, 93-5408.

25-7-703. Procedure upon objection. The objections taken to the appointment of any person as referee must be heard and disposed of by the court. Affidavits may be read and witnesses examined as to such objections.

History: En. Sec. 186, p. 170, L. 1867; re-en. Sec. 226, p. 73, Cod. Stat. 1871; re-en. Sec. 277, p. 109, L. 1877; re-en. Sec. 277, 1st Div. Rev. Stat. 1879; re-en. Sec. 287, 1st Div. Comp. Stat. 1887; re-en. Sec. 1138, C. Civ. Proc. 1895; re-en. Sec. 6779, Rev. C. 1907; re-en. Sec. 9382, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 642; re-en. Sec. 9382, R.C.M. 1935; R.C.M. 1947, 93-5409.

CHAPTER 8

DEPOSIT IN COURT — DELIVERY TO PARTY

Part 1 — General Provisions

Section
25-8-101. When court may order deposit or delivery.
25-8-102. Enforcement of court's order.
25-8-103. With whom money deposited.
25-8-104. Safekeeping of deposit by county treasurer.

Part 1

General Provisions

25-8-101. When court may order deposit or delivery. When it is admitted by the pleading or shown upon the examination of a party that he has in his possession or under his control any money or other thing capable of delivery which, being the subject of the litigation, is held by him as trustee for another party or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party upon such conditions as may be just, subject to the further direction of the court.

History: En. Sec. 115, p. 66, Bannack Stat.; re-en. Sec. 142, p. 160, L. 1867; re-en. Sec. 178, p. 61, Cod. Stat. 1871; re-en. Sec. 227, p. 95, L. 1877; re-en. Sec.

227, 1st Div. Rev. Stat. 1879; re-en. Sec. 235, 1st Div. Comp. Stat. 1887; amd. Sec. 970, C. Civ. Proc. 1895; re-en. Sec. 6705, Rev. C. 1907; re-en. Sec. 9308, R.C.M. 1921; Cal. C. Civ. Proc. 572; re-en. Sec. 9308, R.C.M. 1935; R.C.M. 1947, 93-4501.

25-8-102. Enforcement of court's order. Where the court directs a deposit or delivery of money or where a judgment directs a party to make a deposit or delivery or to convey real property, if the direction is disobeyed, the court, besides punishing the disobedience as a contempt, may by order require the sheriff to take and deposit or deliver the money or other personal property or to convey the real property in conformity with the direction of the court.

History: En. Sec. 229, p. 95, L. 1877; re-en. Sec. 229, 1st Div. Rev. Stat. 1879; re-en. Sec. 237, 1st Div. Comp. Stat. 1887; amd. Sec. 972, C. Civ. Proc. 1895; re-en. Sec. 6707, Rev. C. 1907; re-en. Sec. 9310, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 574; re-en. Sec. 9310, R.C.M. 1935; R.C.M. 1947, 93-4504.

25-8-103. With whom money deposited. (1) Whenever moneys are paid into or deposited in court, the same shall be delivered to the clerk in person or to such of his deputies as shall be specially authorized by his appointment in writing to receive the same. He must, unless otherwise directed by law, deposit it with the county treasurer to be held by him subject to the order of the court.

(2) Such appointment shall be filed with the county treasurer, who shall exhibit it and give to each person applying for the same a certified copy of the same. It shall be in force until a revocation in writing is filed with the county treasurer, who shall thereupon write "revoked" in ink across the face of the appointment.

History: En. Sec. 3443, C. Civ. Proc. 1895; re-en. Sec. 8057, Rev. C. 1907; re-en. Sec. 10701, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2104; re-en. Sec. 10701, R.C.M. 1935; R.C.M. 1947, 93-4503(part).

25-8-104. Safekeeping of deposit by county treasurer. The treasurer shall keep each fund distinct and open an account with each. For the safekeeping of the money deposited with the treasurer, his official bond shall be security.

History: Ap. p. Sec. 3443, C. Civ. Proc. 1895; re-en. Sec. 8057, Rev. C. 1907; re-en. Sec. 10701, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2104; re-en. Sec. 10701, R.C.M. 1935; Sec. 93-4503, R.C.M. 1947; Ap. p. Sec. 228, p. 95, L. 1877; re-en. Sec. 228, 1st. Div. Rev. Stat. 1879; re-en. Sec. 236, 1st Div. Comp. Stat. 1887; amd. Sec. 971, C. Civ. Proc. 1895; re-en. Sec. 6706, Rev. C. 1907; re-en. Sec. 9309, R.C.M.1921; Cal. C. Civ. Proc. Sec. 573; re-en. Sec. 9309, R.C.M. 1935; Sec. 93-4502, R.C.M. 1947; R.C.M. 1947, 93-4502(part), 93-4503(part).

CHAPTER 9

JUDGMENT

Part 1 — General Provisions

Section
25-9-101. Judgment to be on the merits.
25-9-102. Judgment for or against married person.
25-9-103. Death of party after verdict, no lien.
25-9-104. Procedure after judgment on an issue of law.
25-9-105. Validation of defective judgments affecting realty.

Part 2 — Contents of Judgment

25-9-201. Whose rights determined in judgment.

25-9-202. Designation in judgment of principal debtors and sureties.
25-9-203. How amount expressed.
25-9-204. Clerk to include interest in judgment.

Part 3 — Entry of Judgment and Satisfaction — Lien

25-9-301. Docketing of judgment — lien.
25-9-302. Filing of transcript of docket in another county.
25-9-303. Filing of transcript of docket of federal court.
Sections 25-9-304 through 25-9-310 reserved.
25-9-311. Entry of satisfaction of judgment in docket.

Part 1

General Provisions

25-9-101. Judgment to be on the merits. In every case, judgment must be rendered on the merits, except as provided in Rule 41, M.R.Civ.P.

History: En. Sec. 122, p. 68, Bannack Stat.; re-en. Sec. 149, p. 162, L. 1867; re-en. Sec. 185, p. 63, Cod. Stat. 1871; re-en. Sec. 235, p. 96, L. 1877; re-en. Sec. 235, 1st Div. Rev. Stat. 1879; re-en. Sec. 243, 1st Div. Comp. Stat. 1887; re-en. Sec. 1005, C. Civ. Proc. 1895; re-en. Sec. 6715, Rev. C. 1907; re-en. Sec. 9318, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 582; re-en. Sec. 9318, R.C.M. 1935; R.C.M. 1947, 93-4706.

25-9-102. Judgment for or against married person. Judgment for or against a married person may be rendered and enforced as if such person were single.

History: En. Sec. 1006, C. Civ. Proc. 1895; re-en. Sec. 6716, Rev. C. 1907; re-en. Sec. 9319, R.C.M. 1921; re-en. Sec. 9319, R.C.M. 1935; amd. Sec. 54, Ch. 535, L. 1975; R.C.M. 1947, 93-4707.

25-9-103. Death of party after verdict, no lien. If a party die after a verdict or decision upon any issue of fact and before judgment, the court may nevertheless render judgment thereon. Such a judgment is not a lien on the real property of the deceased party but is payable in the course of administration on his estate.

History: En. Sec. 178, p. 78, Bannack Stat.; amd. Sec. 202, p. 174, L. 1867; re-en. Sec. 242, p. 77, Cod. Stat. 1871; re-en. Sec. 293, p. 116, L. 1877; re-en. Sec. 293, 1st Div. Rev. Stat. 1879; re-en. Sec. 305, 1st Div. Comp. Stat. 1887; re-en. Sec. 1195, C. Civ. Proc. 1895; re-en. Sec. 6805, Rev. C. 1907; re-en. Sec. 9408, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 669; re-en. Sec. 9408, R.C.M. 1935; R.C.M. 1947, 93-5706.

25-9-104. Procedure after judgment on an issue of law. On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by Rule 55(a) and (b), M.R.Civ.P., upon the failure of the defendant to answer. If judgment be for the defendant upon an issue of law and the taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference may be ordered, as provided in Rule 55(b).

History: En. Sec. 272, p. 107, L. 1877; re-en. Sec. 272, 1st Div. Rev. Stat. 1879; re-en. Sec. 282, 1st Div. Comp. Stat. 1887; re-en. Sec. 1118, C. Civ. Proc. 1895;

re-en. Sec. 6770, Rev. C. 1907; re-en. Sec. 9373, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 636; re-en. Sec. 9373, R.C.M. 1935; R.C.M. 1947, 93-5309.

25-9-105. Validation of defective judgments affecting realty. Any judgment or decree of any court of this state affecting real property, provided that no action is now pending to set aside any such judgment or decree, which was, prior to January 1, 1973, copied into the proper book kept in the office of the clerk of the district court, and certified copy of which judgment or decree was, previous to July 1, 1973, recorded in the proper book kept in the office of the county clerk and recorder shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, informality, or irregularity in any of the court proceedings in the action in which such judgment or decree was entered and obtained, if time for appeal in the case has expired; and such judgment or decree shall not be deemed invalidated by reason of any such defect, omission, informality, or irregularity; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of such judgment or decree or of the record thereof may be read in evidence with like effect as copies of a judgment or decree duly and regularly obtained and recorded and entered.

History: En. Sec. 1, Ch. 146, L. 1973; R.C.M. 1947, 93-5710.5.

Part 2

Contents of Judgment

25-9-201. Whose rights determined in judgment. Judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves.

History: En. Sec. 118, p. 67, Bannack Stat.; re-en. Sec. 145, p. 161, L. 1867; re-en. Sec. 181, p. 62, Cod. Stat. 1871; re-en. Sec. 231, p. 95, L. 1877; re-en. Sec. 231, 1st. Div. Rev. Stat. 1879; re-en. Sec. 239, 1st Div. Comp. Stat. 1887; re-en. Sec. 1001, C. Civ. Proc. 1895; re-en. Sec. 6711, Rev. C. 1907; re-en. Sec. 9314, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 578; re-en. Sec. 9314, R.C.M. 1935; R.C.M. 1947, 93-4702(part).

25-9-202. Designation in judgment of principal debtors and sureties. Upon the rendition of any judgment, if it shall be shown that one or more of the defendants against whom the judgment is to be rendered are principal debtors and others of the said defendants are sureties of such principal debtor, the court may order the judgment so to state.

History: En. Sec. 118, p. 67, Bannack Stat.; re-en. Sec. 145, p. 161, L. 1867; re-en. Sec. 181, p. 62, Cod. Stat. 1871; re-en. Sec. 231, p. 95, L. 1877; re-en. Sec. 231, 1st. Div. Rev. Stat. 1879; re-en. Sec. 239, 1st Div. Comp. Stat. 1887; re-en. Sec. 1001, C. Civ. Proc. 1895; re-en. Sec. 6711, Rev. C. 1907; re-en. Sec. 9314, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 578; re-en. Sec. 9314, R.C.M. 1935; R.C.M. 1947, 93-4702(part).

25-9-203. How amount expressed. In judgments, the amount thereof must be computed and stated as near as may be in dollars and cents, rejecting fractions of a cent.

History: En. Sec. 3152, Pol. C. 1895; re-en. Sec. 2035, Rev. C. 1907; re-en. Sec. 4285, R.C.M. 1921; Cal. Pol. C. Sec. 3274; re-en. Sec. 4285, R.C.M. 1935; R.C.M. 1947, 93-4710(part).

25-9-204. Clerk to include interest in judgment. The clerk must include in the judgment entered up by him any interest on the verdict or decision of the court, from the time it was rendered or made.

History: En. Sec. 482, p. 230, L. 1867; re-en. Sec. 558, p. 149, Cod. Stat. 1871; re-en. Sec. 500, p. 172, L. 1877; re-en. Sec. 500, 1st Div. Rev. Stat. 1879; re-en. Sec. 513, 1st Div. Comp. Stat. 1887; re-en. Sec. 1870, C. Civ. Proc. 1895; re-en. Sec. 7173, Rev. C. 1907; re-en. Sec. 9806, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1035; re-en. Sec. 9806, R.C.M. 1935; R.C.M. 1947, 93-8622(part).

Part 3

Entry of Judgment and Satisfaction — Lien

25-9-301. Docketing of judgment — lien. (1) Immediately after the entry of the judgment in the judgment book, the clerk must make the proper entries of the judgment under appropriate heads in the docket kept by him.

(2) From the time the judgment is docketed, it becomes a lien upon all real property of the judgment debtor not exempt from execution in the county, owned by him at the time or which he may afterward acquire until the lien ceases. The lien continues for 6 years unless the judgment be previously satisfied.

History: En. Sec. 180, p. 78, Bannack Stat.; en. Sec. 204, p. 174, L. 1867; re-en. Sec. 244, p. 77, Cod. Stat. 1871; amd. Sec. 1, p. 40, L. 1876; re-en. Sec. 295, p. 116, L. 1877; re-en. Sec. 295, 1st Div. Rev. Stat. 1879; re-en. Sec. 307, 1st Div. Comp. Stat. 1887; re-en. Sec. 1197, C. Civ. Proc. 1895; re-en. Sec. 6807, Rev. C. 1907; re-en. Sec. 9410, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 671; re-en. Sec. 9410, R.C.M. 1935; amd. Sup. Ct. Ord. 11020, December 10, 1965, eff. January 1, 1966; R.C.M. 1947, 93-5708.

25-9-302. Filing of transcript of docket in another county. A transcript of the original docket, certified by the clerk, may be filed with the district court clerk of any other county; and from the time of the filing, the judgment becomes a lien upon all real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time or which he may afterward and before the lien expires acquire. The lien continues for 6 years unless the judgment be previously satisfied.

History: En. Sec. 181, p. 78, Bannack Stat.; re-en. Sec. 207, p. 175, L. 1867; re-en. Sec. 247, p. 78, L. 1871; en. Sec. 1, p. 40, L. 1876; re-en. Sec. 298, p. 117, L. 1877; re-en. Sec. 298, 1st Div. Rev. Stat. 1879; re-en. Sec. 310, 1st Div. Comp. Stat. 1887; amd. Sec. 1200, C. Civ. Proc. 1895; re-en. Sec. 6810, Rev. C. 1907; re-en. Sec. 9413, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 674; re-en. Sec. 9413, R.C.M. 1935; R.C.M. 1947, 93-5712.

25-9-303. Filing of transcript of docket of federal court. A transcript of the original docket of any judgment rendered in the circuit or district court of the United States, ninth circuit, district of Montana, certified by the clerk of said court, may be filed with the district court clerk of any county; and from the time of the filing, the judgment becomes a lien upon all real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time or which he may afterward and before the lien expires acquire. The lien shall continue for 6 years unless the judgment be previously satisfied.

History: En. Sec. 1, Ch. 14, L. 1907; re-en. Sec. 6812, Rev. C. 1907; re-en. Sec. 9415, R.C.M. 1921; re-en. Sec. 9415, R.C.M. 1935; R.C.M. 1947, 93-5714.

25-9-304 through 25-9-310 reserved.

25-9-311. Entry of satisfaction of judgment in docket. Satisfaction of a judgment may be entered in the clerk's docket upon an execution returned satisfied or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property by the judgment creditor or by his endorsement on the face or on the margin of the record of the judgment or by his attorney unless a revocation of his authority is filed. Whenever a judgment is satisfied in fact otherwise than upon an execution, the party or attorney must give such acknowledgment or make such endorsement, and upon motion, the court may compel it or may order the entry of satisfaction to be made without it.

History: En. Sec. 182, p. 79, Bannack Stat.; amd. Sec. 208, p. 175, L. 1867; re-en. Sec. 248, p. 78, L. 1871; en. Sec. 299, p. 117, L. 1877; re-en. Sec. 299, 1st Div. Rev. Stat. 1879; re-en. Sec. 311, 1st Div. Comp. Stat. 1887; re-en. Sec. 1201, C. Civ. Proc. 1895; re-en. Sec. 6811, Rev. C. 1907; re-en. Sec. 9414, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 675; re-en. Sec. 9414, R.C.M. 1935; R.C.M. 1947, 93-5713.

CHAPTER 10

COSTS

Part 1 — Imposition of Costs

Section
25-10-101. When costs allowed, of course, to plaintiff.
25-10-102. When costs allowed, of course, to defendant.
25-10-103. When costs discretionary.
25-10-104. When costs of appeal discretionary.
25-10-105. Costs of review other than by appeal.
25-10-106. Several defendants not united in interest.
25-10-107. Costs when tender was made before commencement of action.
25-10-108. Imposing costs on party acting as representative.

Part 2 — Allowable Costs

25-10-201. Costs generally allowable.
25-10-202. Costs of demurrer or motion.
25-10-203. Costs of postponement.
25-10-204. Costs of transferring papers — change of venue.
25-10-205. Costs of securing witnesses — disqualification of judge.
25-10-206. Secretary of state's fee for accepting service of process.

Part 3 — Attorneys' Fees

25-10-301. Determining compensation of attorneys.
25-10-302. Inclusion of attorney's fees in bill of costs.

Part 4 — Officers' Fees, Prepayment

25-10-401. Itemization of officer's fees.
25-10-402. No charge for copies furnished by party.
25-10-403. Prepayment of fees.
25-10-404. Poor persons not required to prepay fees.
25-10-405. Governmental entities not required to prepay fees.
25-10-406. Collection of clerk's and sheriff's costs after judgment.

Part 5 — Claiming Costs

25-10-501. Bill of costs.

25-10-502. Procedure upon objection to bill of costs.
25-10-503. How costs on appeal claimed.
25-10-504. Clerk to include costs in judgment.

Part 6 — Security for Costs

25-10-601. Security for costs from nonresident plaintiff.
25-10-602. Dismissal when security not given.

Part 7 — Payment of Costs by Governmental Entities

25-10-701. Public officers not to be personally taxed.
25-10-702. Payment of costs by state.
25-10-703. Payment of costs by county.

Part 1

Imposition of Costs

25-10-101. When costs allowed, of course, to plaintiff. Costs are allowed, of course, to the plaintiff upon a judgment in his favor in the following cases:

(1) in an action for the recovery of real property or damages thereto;

(2) in an action to recover the possession of personal property where the value of the property exceeds $50; such value shall be determined by the jury, court, or referee by whom the action is tried;

(3) in an action for the recovery of money or damages, exclusive of interest, when plaintiff recovers over $50;

(4) in a special proceeding;

(5) in an action which involves the title or possession or right of possession of real estate; or the legality of any tax, impost, assessment, toll, or municipal fine; or quo warranto proceedings;

(6) in an action to foreclose a lien or pledge, to prevent or abate a nuisance, or for an injunction.

History: En. Sec. 401, p. 126, Bannack Stat.; re-en. Sec. 470, p. 229, L. 1867; re-en. Sec. 546, p. 147, Cod. Stat. 1871; re-en. Sec. 482, p. 168, L. 1877; re-en. Sec. 482, 1st Div. Rev. Stat. 1879; amd. Sec. 10, p. 11, L. 1881; re-en. Sec. 495, 1st Div. Comp. Stat. 1887; en. Sec. 1851, C. Civ. Proc. 1895; re-en. Sec. 7154, Rev. C. 1907; re-en. Sec. 9787, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1022; re-en. Sec. 9787, R.C.M. 1935; R.C.M. 1947, 93-8602.

25-10-102. When costs allowed, of course, to defendant. Costs must be allowed, of course, to the defendant upon a judgment in his favor in the actions mentioned in 25-10-101.

History: En. Sec. 472, p. 229, L. 1867; re-en. Sec. 548, p. 148, Cod. Stat. 1871; re-en. Sec. 484, p. 169, L. 1877; re-en. Sec. 484, 1st Div. Rev. Stat. 1879; re-en. Sec. 497, 1st Div. Comp. Stat. 1887; amd. Sec. 1853, C. Civ. Proc. 1895; re-en. Sec. 7155, Rev. C. 1907; re-en. Sec. 9788, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1024; re-en. Sec. 9788, R.C.M. 1935; R.C.M. 1947, 93-8603.

25-10-103. When costs discretionary. In other actions than those mentioned in 25-10-101, costs may be allowed or not and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court, but no costs can be allowed in an action for the recovery of money or damages when the plaintiff fails to recover more than $50 or in an action to recover the possession of personal property when the value of the property is not more than $50.

History: En. Sec. 404, p. 127, Bannack Stat.; en. Sec. 473, p. 229, L. 1867; re-en. Sec. 549, p. 148, Cod. Stat. 1871; re-en. Sec. 485, p. 169, L. 1877; re-en. Sec. 485, 1st Div. Rev. Stat. 1879; amd. Sec. 11, p. 11, L. 1881; re-en. Sec. 498, 1st Div. Comp. Stat. 1887; amd. Sec. 1853, C. Civ. Proc. 1895; re-en. Sec. 7156, Rev. C. 1907; re-en. Sec. 9789, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1025; re-en. Sec. 9789, R.C.M. 1935; R.C.M. 1947, 93-8604.

25-10-104. When costs of appeal discretionary. (1) In the following cases, the costs of appeal are in the discretion of the court:

(a) when a new trial is ordered;

(b) when a judgment is modified.

(2) In all other cases the successful party shall recover from the other party his costs.

History: En. Sec. 406, p. 127, Bannack Stat.; amd. Sec. 475, p. 229, L. 1867; re-en. Sec. 551, p. 148, Cod. Stat. 1871; re-en. Sec. 487, p. 169, L. 1877; re-en. Sec. 487, 1st Div. Rev. Stat. 1879; re-en. Sec. 500, 1st Div. Comp. Stat. 1887; amd. Sec. 1855, C. Civ. Proc. 1895; re-en. Sec. 7158, Rev. C. 1907; re-en. Sec. 9791, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1027; re-en. Sec. 9791, R.C.M. 1935; R.C.M. 1947, 93-8606.

25-10-105. Costs of review other than by appeal. When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review in any other way than by appeal, the same costs must be allowed as in cases on appeal and may be collected by execution or in such manner as the court may direct, according to the nature of the case.

History: En. Sec. 411, p. 127, Bannack Stat.; re-en. Sec. 480, p. 230, L. 1867; re-en. Sec. 556, p. 149, Cod. Stat. 1871; re-en. Sec. 493, p. 170, L. 1877; re-en. Sec. 493, 1st Div. Rev. Stat. 1879; re-en. Sec. 506, 1st Div. Comp. Stat. 1887; re-en. Sec. 1860, C. Civ. Proc. 1895; re-en. Sec. 7163, Rev. C. 1907; re-en. Sec. 9796, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1032; re-en. Sec. 9796, R.C.M. 1935; R.C.M. 1947, 93-8611.

25-10-106. Several defendants not united in interest. When there are several defendants in the actions mentioned in 25-10-101, not united in interest and making separate defenses by separate answers, and plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor.

History: En. Sec. 474, p. 229, L. 1867; re-en. Sec. 550, p. 148, Cod. Stat. 1871; re-en. Sec. 486, p. 169, L. 1877; re-en. Sec. 486, 1st Div. Rev. Stat. 1879; re-en. Sec. 499, 1st Div. Comp. Stat. 1887; re-en. Sec. 1854, C. Civ. Proc. 1895; re-en. Sec. 7157, Rev. C. 1907; re-en. Sec. 9790, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1026; re-en. Sec. 9790, R.C.M. 1935; R.C.M. 1947, 93-8605.

25-10-107. Costs when tender was made before commencement of action. When, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled and thereupon deposits in court for plaintiff the amount so tendered and the allegation be found to be true, the plaintiff cannot recover costs but must pay costs to the defendant.

History: En. Sec. 409, p. 127, Bannack Stat.; amd. Sec. 478, p. 229, L. 1867; re-en. Sec. 554, p. 148, Cod. Stat. 1871; re-en. Sec. 491, p. 170, L. 1877; re-en. Sec. 491, 1st Div. Rev. Stat. 1879; re-en. Sec. 504, 1st Div. Comp. Stat. 1887;

re-en. Sec. 1858, C. Civ. Proc. 1895; re-en. Sec. 7161, Rev. C. 1907; re-en. Sec. 9794, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1030; re-en. Sec. 9794, R.C.M. 1935; R.C.M. 1947, 93-8609.

25-10-108. Imposing costs on party acting as representative. In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or person expressly authorized by statute, costs may be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs must, by the judgment, be made chargeable only upon the estate, fund, or party represented unless the court directs the same to be paid by the plaintiff or defendant personally for mismanagement or bad faith in the action or defense.

History: En. Sec. 410, p. 127, Bannack Stat.; re-en. Sec. 479, p. 230, L. 1867; re-en. Sec. 555, p. 148, Cod. Stat. 1871; re-en. Sec. 492, p. 170, L. 1877; re-en. Sec. 492, 1st Div. Rev. Stat. 1879; re-en. Sec. 505, 1st Div. Comp. Stat. 1887; re-en. Sec. 1859, C. Civ. Proc. 1895; re-en. Sec. 7162, Rev. C. 1907; re-en. Sec. 9795, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1031; re-en. Sec. 9795, R.C.M. 1935; R.C.M. 1947, 93-8610.

Part 2

Allowable Costs

25-10-201. Costs generally allowable. A party to whom costs are awarded in an action is entitled to include in his bill of costs his necessary disbursements, as follows:

(1) the legal fees of witnesses, including mileage, or referees and other officers;
(2) the expenses of taking depositions;
(3) the legal fees for publication when publication is directed;
(4) the legal fees paid for filing and recording papers and certified copies thereof necessarily used in the action or on the trial;
(5) the legal fees paid stenographers for per diem or for copies;
(6) the reasonable expenses of printing papers for a hearing when required by a rule of court;
(7) the reasonable expenses of making transcript for the supreme court;
(8) the reasonable expenses for making a map or maps if required and necessary to be used on trial or hearing; and
(9) such other reasonable and necessary expenses as are taxable according to the course and practice of the court or by express provision of law.

History: En. Sec. 1866, C. Civ. Proc. 1895; re-en. Sec. 7169, Rev. C. 1907; re-en. Sec. 9802, R.C.M. 1921; re-en. Sec. 9802, R.C.M. 1935; R.C.M. 1947, 93-8618.

25-10-202. Costs of demurrer or motion. In all cases where a demurrer or motion is sustained or overruled, the losing party must pay to the other $10 as costs. If a demurrer or motion be withdrawn before the hearing, it shall be deemed overruled.

History: En. Sec. 1861, C. Civ. Proc. 1895; re-en. Sec. 7164, Rev. C. 1907; re-en. Sec. 9797, R.C.M. 1921; re-en. Sec. 9797, R.C.M. 1935; R.C.M. 1947, 93-8612.

25-10-203. Costs of postponement. When an application is made to the court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same.

History: En. Sec. 408, p. 127, Bannack Stat.; re-en. Sec. 477, p. 229, L. 1867; re-en. Sec. 553, p. 148, Cod. Stat. 1871; re-en. Sec. 490, p. 170, L. 1877; re-en.

Sec. 490, 1st Div. Rev. Stat. 1879; re-en. Sec. 503, 1st Div. Comp. Stat. 1887; re-en. Sec. 1857, C. Civ. Proc. 1895; re-en. Sec. 7160, Rev. C. 1907; re-en. Sec. 9793, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1029; re-en. Sec. 9793, R.C.M. 1935; R.C.M. 1947, 93-8608.

25-10-204. Costs of transferring papers — change of venue. The costs and fees of transmitting the pleading and papers when an order is made transferring an action or proceeding for trial and of filing the papers anew must be paid by the party at whose instance the order was made; except that the party filing the complaint must pay all costs and fees of filing the papers anew and all costs and fees, including reasonable attorneys' fees to be fixed by the court, incurred by the defendant by reason of the change of venue motion and hearing when:

(1) the action is an action upon a contract, express or implied, for the direct payment of money and no claim contained in the complaint exceeds $1,000;

(2) the county designated in the complaint is not the proper county; and

(3) the plaintiff will not within 10 days after request stipulate for change of venue and defendant files a motion for such change and such motion is thereafter granted.

History: En. Sec. 64, p. 53, L. 1877; re-en. Sec. 64, 1st Div. Rev. Stat. 1879; re-en. Sec. 64, 1st Div. Comp. Stat. 1887; re-en. Sec. 617, C. Civ. Proc. 1895; re-en. Sec. 6508, Rev. C. 1907; re-en. Sec. 9100, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 399; re-en. Sec. 9100, R.C.M. 1935; amd. Sec. 1, Ch. 176, L. 1971; R.C.M. 1947, 93-2908(part).

25-10-205. Costs of securing witnesses — disqualification of judge. Where an affidavit is filed disqualifying a judge, as provided in [93-2906(4)], after the action or proceeding is set for trial or hearing, the party filing the same shall pay to the opposite party all costs necessarily incurred in securing the attendance of witnesses between the date the order was made fixing the day of hearing or trial and the time the affidavit was filed, and such costs so paid shall not be recoverable in the action or proceeding.

History: En. Sec. 1, Ch. 5, Ex. L. 1903; re-en. Sec. 6511, Rev. C. 1907; re-en. Sec. 9103, R.C.M. 1921; re-en. Sec. 9103, R.C.M. 1935; R.C.M. 1947, 93-2911.

25-10-206. Secretary of state's fee for accepting service of process. The fee of $5 paid by the plaintiff to the secretary of state pursuant to part 6 of chapter 3 and Rule 4D(6), M.R.Civ.P., shall be taxed as part of his costs if he prevails in the action.

History: En. Sec. 5, Ch. 10, L. 1937; amd. Sec. 11, Ch. 117, L. 1961; R.C.M. 1947, 53-205.

Part 3

Attorneys' Fees

25-10-301. Determining compensation of attorneys. The measure and mode of compensation of attorneys and counselors at law is left to agreement, express or implied, of the parties, except that in probate proceedings the court may fix and allow the compensation of attorneys representing administrators, executors, guardians, trustees, and agents appointed by the court. But parties to actions or proceedings are entitled to costs and disbursements as provided by law.

History: En. Sec. 469, p. 228, L. 1867; re-en. Sec. 545, p. 147, Cod. Stat. 1871; re-en. Sec. 481, p. 168, L. 1877; re-en. Sec. 481, 1st Div. Rev. Stat. 1879; re-en. Sec. 494, 1st Div. Comp. Stat. 1887; amd. Sec. 1850, C. Civ. Proc. 1895; re-en. Sec.

7153, Rev. C. 1907; amd. Sec. 1, Ch. 45, L. 1919; re-en. Sec. 9786, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1021; re-en. Sec. 9786, R.C.M. 1935; R.C.M. 1947, 93-8601.

25-10-302. Inclusion of attorney's fees in bill of costs. The attorney's fees mentioned in 30-9-511, 71-1-233, and 71-3-124 need not be included in the cost bill if they are made a part of the judgment.

History: En. Sec. 1865, C. Civ. Proc. 1895; re-en. Sec. 7168, Rev. C. 1907; re-en. Sec. 9801, R.C.M. 1921; re-en. Sec. 9801, R.C.M. 1935; R.C.M. 1947, 93-8617.

Part 4

Officers' Fees, Prepayment

25-10-401. Itemization of officer's fees. No fees of any officer shall be payable until an itemized account of the same, signed by the officer, shall be presented to the person liable therefor.

History: En. Sec. 11, p. 52, L. 1874; re-en. Sec. 815, 1st Div. Rev. Stat. 1879; re-en. Sec. 521, 1st Div. Comp. Stat. 1887; en. Sec. 1877, C. Civ. Proc. 1895; re-en. Sec. 7180, Rev. C. 1907; re-en. Sec. 9813, R.C.M. 1921; re-en. Sec. 9813, R.C.M. 1935; R.C.M. 1947, 93-8629.

25-10-402. No charge for copies furnished by party. In all cases where copies of pleadings, affidavits, or other papers are to be served, neither the sheriff nor clerk shall charge or receive a fee for making such copies when the same are furnished to such officer by the party to the action or his attorney.

History: En. Sec. 1905, C. Civ. Proc. 1895; re-en. Sec. 7199, Rev. C. 1907; re-en. Sec. 9832, R.C.M. 1921; re-en. Sec. 9832, R.C.M. 1935; R.C.M. 1947, 93-8717.

27-10-403. Prepayment of fees. Each party to a civil action is required to pay the fees fixed by law for the performance of any service or duty by any officer of such court at the instance of such party at the time such service is rendered, except in the case mentioned in 25-10-405 and 25-10-701; and no such officer is required to perform such service or duty unless the fees fixed therefor are, on demand, first paid or tendered.

History: En. Sec. 565, p. 150, Cod. Stat. 1871; re-en. Sec. 505, p. 173, L. 1877; re-en. Sec. 505, 1st Div. Rev. Stat. 1879; re-en. Sec. 518, 1st Div. Comp. Stat. 1887; re-en. Sec. 1875, C. Civ. Proc. 1895; re-en. Sec. 7178, Rev. C. 1907; re-en. Sec. 9811, R.C.M. 1921; re-en. Sec. 9811, R.C.M. 1935; R.C.M. 1947, 93-8627.

25-10-404. Poor persons not required to prepay fees. Any person, who will file an affidavit stating that he has a good cause of action or defense and that he is unable to pay the costs or procure security to secure the same, may commence and prosecute or defend an action in any of the courts and administrative tribunals of this state; then it is hereby made the duty of the officers of the courts and administrative tribunals to issue all writs and serve the same and perform all services in the action without demanding or receiving their fees in advance.

History: En. Sec. 2, p. 71, L. 1869; re-en. Sec. 563, p. 150, Cod. Stat. 1871; amd. Sec. 1, p. 40, Ex. L. 1873; amd. Sec. 503, p. 173, L. 1877; re-en. Sec. 503, 1st Div. Rev. Stat. 1879; re-en. Sec. 516, 1st Div. Comp. Stat. 1887; re-en. Sec.1873, C. Civ., Proc. 1895; re-en. Sec. 7176, Rev. C. 1907; re-en. Sec. 9809, R.C.M. 1921; re-en. Sec. 9809, R.C.M. 1935; amd. Sec. 1, Ch. 71, L. 1971; amd. Sec. 1, Ch. 90, L. 1973; R.C.M. 1947, 93-8625.

25-10-405. Governmental entities not required to prepay fees. The state, a county, a municipality, or any subdivision thereof or any officer when prosecuting or defending an action on behalf of the state, a county, a municipality, or a subdivision thereof is not required to pay or deposit any fee or amount to or with any officer during the prosecution or defense of an action.

History: En. Sec. 564, p. 150, Cod. Stat. 1871; re-en. Sec. 504, p. 173, L. 1877; re-en. Sec. 504, 1st Div. Rev. Stat 1879; re-en. Sec. 517, 1st Div. Comp. Stat. 1887; en. Sec. 1874, C. Civ. Proc. 1895; re-en. Sec. 7177, Rev. C. 1907; re-en. Sec. 9810, R.C.M. 1921; amd. Sec. 1, Ch. 9, L. 1925; re-en. Sec. 9810, R.C.M. 1935; R.C.M. 1947, 93-8626(part).

25-10-406. Collection of clerk's and sheriff's costs after judgment. In all cases, after final judgment, the clerk or sheriff may make out a bill of costs against the party incurring them, and if not paid within 20 days after demand, execution may issue in the name of the parties to the action for the benefit of the clerk or sheriff.

History: En. Sec. 10, p. 51, L. 1874; re-en. Sec. 814, 1st Div. Rev. Stat. 1879; re-en. Sec. 520, 1st Div. Comp. Stat. 1887; en. Sec. 1876, C. Civ. Proc. 1895; re-en. Sec. 7179, Rev. C. 1907; re-en. Sec. 9812, R.C.M. 1921; re-en. Sec. 9812, R.C.M. 1935; R.C.M. 1947, 93-8628.

Part 5

Claiming Costs

25-10-501. Bill of costs. The party in whose favor judgment is rendered and who claims his costs must deliver to the clerk and serve upon the adverse party, within 5 days after the verdict or notice of the decision of the court or referee or, if the entry of the judgment on the verdict or decision be stayed, then before such entry is made, a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party, his attorney or agent, or the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct and that the disbursements have been necessarily incurred in the action or proceeding.

History: En. Sec. 412, p. 128, Bannack Stat.; amd. Sec. 481, p. 230, L. 1867; re-en. Sec. 557, p. 149, Cod. Stat. 1871; amd. Sec. 1, p. 39, Ex. L. 1873; amd. Sec. 9, p. 51, L. 1874; amd. Secs. 494-497, p. 171, L. 1877; re-en. Secs. 494-497, 1st Div. Rev. Stat. 1879; re-en. Secs. 507-510, 1st Div. Comp. Stat. 1887; re-en. Sec. 1867, C. Civ. Proc. 1895; re-en. Sec. 7170, Rev. C. 1907; re-en. Sec. 9803, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1033; re-en. Sec. 9803, R.C.M. 1935; R.C.M. 1947, 93-8619(part).

25-10-502. Procedure upon objection to bill of costs. A party dissatisfied with the costs claimed may, within 5 days after notice of filing of the bill of costs, file and serve a notice of a motion to have the same taxed by the court in which the judgment was rendered or by the judge thereof at chambers.

History: En. Sec. 412, p. 128, Bannack Stat.; amd. Sec. 481, p. 230, L. 1867; re-en. Sec. 557, p. 149, Cod. Stat. 1871; amd. Sec. 1, p. 39, Ex. L. 1873; amd. Sec. 9, p. 51, L. 1874; amd. Secs. 494-497, p. 171, L. 1877; re-en. Secs. 494-497, 1st Div. Rev. Stat. 1879; re-en. Secs. 507-510, 1st Div. Comp. Stat. 1887; re-en. Sec. 1867, C. Civ. Proc. 1895; re-en. Sec. 7170, Rev. C. 1907; re-en. Sec. 9803, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1033; re-en. Sec. 9803, R.C.M. 1935; R.C.M. 1947, 93-8619(part).

25-10-503. How costs on appeal claimed. Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within 30 days after the remittitur is filed with the clerk below, deliver to such clerk a memorandum of his costs, verified as prescribed in 25-10-501, and thereafter he may have an execution therefor as upon a judgment.

History: En. Sec. 499, p. 172, L. 1877; re-en. Sec. 499, 1st Div. Rev. Stat. 1879; re-en. Sec. 512, 1st Div. Comp. Stat. 1887; re-en. Sec. 1869, C. Civ. Proc. 1895; re-en. Sec. 7172, Rev. C. 1907; re-en. Sec. 9805, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1034; re-en. Sec. 9805, R.C.M. 1935; R.C.M. 1947, 93-8621.

25-10-504. Clerk to include costs in judgment. The clerk must include in the judgment entered up by him the costs, if the same have been taxed or ascertained; and he must, within 2 days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank left in the judgment for that purpose and must make a similar insertion of the costs in the copies and docket of the judgment.

History: En. Sec. 482, p. 230, L. 1867; re-en. Sec. 558, p. 149, Cod. Stat. 1871; re-en. Sec. 500, p. 172, L. 1877; re-en. Sec. 500, 1st Div. Rev. Stat. 1879; re-en. Sec. 513, 1st Div. Comp. Stat. 1887; re-en. Sec. 1870, C. Civ. Proc. 1895; re-en. Sec. 7173, Rev. C. 1907; re-en. Sec. 9806, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1035; re-en. Sec. 9806, R.C.M. 1935; R.C.M. 1947, 93-8622(part).

Part 6

Security for Costs

25-10-601. Security for costs from nonresident plaintiff. When the plaintiff in an action resides out of this state or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff may be required by the defendant. When required, all proceedings in the action must be stayed until an undertaking, executed by two or more persons, is filed with the clerk to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment or in the progress of the action, not exceeding $300. A new or an additional undertaking may be ordered by the court or judge upon proof that the original undertaking is insufficient security and proceedings in the action stayed until such new or additional undertaking is executed and filed.

History: En. Sec. 414, p. 128, Bannack Stat.; amd. Sec. 483, p. 230, L. 1867; re-en. Sec. 559, p. 149, Cod. Stat. 1871; re-en. Sec. 501, p. 172, L. 1877; re-en. Sec. 501, 1st Div. Rev. Stat. 1879; re-en. Sec. 514, 1st Div. Comp. Stat. 1887; re-en. Sec. 1871, C. Civ. Proc. 1895; re-en. Sec. 7174, Rev. C. 1907; re-en. Sec. 9807, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1036; re-en. Sec. 9807, R.C.M. 1935; R.C.M. 1947, 93-8623.

25-10-602. Dismissal when security not given. After the lapse of 30 days from the service of notice that security is required or of an order for new or additional security, upon proof thereof and that no undertaking as required has been filed, the court or judge may order the action to be dismissed.

History: En. Sec. 485, p. 230, L. 1867; re-en. Sec. 561, p. 149, Cod. Stat. 1871; re-en. Sec. 502, p. 173, L. 1877; re-en. Sec. 502, 1st Div. Rev. Stat. 1879; re-en. Sec. 515, 1st Div. Comp. Stat. 1887; re-en. Sec. 1872, C. Civ. Proc. 1895; re-en. Sec. 7175, Rev. C. 1907; re-en. Sec. 9808, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1037; re-en. Sec. 9808, R.C.M. 1935; R.C.M. 1947, 93-8624.

Part 7

Payment of Costs by Governmental Entities

25-10-701. Public officers not to be personally taxed. No officer prosecuting or defending as provided in 25-10-405 shall be taxed with costs or damages, but such costs or damages, if any, shall be taxed to the state, county, or municipality, as the case may be.

History: En. Sec. 564, p. 150, Cod. Stat. 1871; re-en. Sec. 504, p. 173, L. 1877; re-en. Sec. 504, 1st Div. Rev. Stat 1879; re-en. Sec. 517, 1st Div. Comp. Stat. 1887; en. Sec. 1874, C. Civ. Proc. 1895; re-en. Sec. 7177, Rev. C. 1907; re-en. Sec. 9810, R.C.M. 1921; amd. Sec. 1, Ch. 9, L. 1925; re-en. Sec. 9810, R.C.M. 1935; R.C.M. 1947, 93-8626(part).

25-10-702. Payment of costs by state. When the state is a party and costs are awarded against it, they must be paid out of the state treasury.

History: En. Sec. 1878, C. Civ. Proc. 1895; re-en. Sec. 7181, Rev. C. 1907; re-en. Sec. 9814, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1038; re-en. Sec. 9814, R.C.M. 1935; R.C.M. 1947, 93-8630.

25-10-703. Payment of costs by county. When a county is a party and costs are awarded against it, they must be paid out of the county treasury.

History: En. Sec. 1879, C. Civ. Proc. 1895; re-en. Sec. 7182, Rev. C. 1907; re-en. Sec. 9815, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1039; re-en. Sec. 9815, R.C.M. 1935; R.C.M. 1947, 93-8631.

CHAPTER 11

NEW TRIAL

Part 1 — General Provisions

Section
25-11-101. New trial defined.
25-11-102. Grounds for new trial.
25-11-103. Grounds after trial by the court.
25-11-104. How motion for new trial made.

Part 1

General Provisions

25-11-101. New trial defined. A new trial is a reexamination of an issue of fact in the same court after a trial and decision by a jury or court or by referees.

History: En. Sec. 168, p. 76, Bannack Stat.; en. Sec. 192, p. 171, L. 1867; re-en. Sec. 232, p. 74, Cod. Stat. 1871; re-en. Sec. 284, p. 111, L. 1877; re-en. Sec. 284, 1st Div. Rev. Stat. 1879; re-en. Sec. 295, 1st Div. Comp. Stat. 1887; re-en. Sec. 1170, C. Civ. Proc. 1895; re-en. Sec. 6793, Rev. C. 1907; re-en. Sec. 9395, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 656; re-en. Sec. 9395, R.C.M. 1935; R.C.M. 1947, 93-5601.

25-11-102. Grounds for new trial. The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

(1) irregularity in the proceedings of the court, jury, or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;

(2) misconduct of the jury. Whenever any one or more of the jurors have been induced to assent to any general or special verdict or to a finding on any question submitted to them by the court by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

(3) accident or surprise which ordinary prudence could not have guarded against;

(4) newly discovered evidence material for the party making the application which he could not, with reasonable diligence, have discovered and produced at the trial;

(5) excessive damages appearing to have been given under the influence of passion or prejudice;

(6) insufficiency of the evidence to justify the verdict or other decision or that it is against law;

(7) error in law occurring at the trial and excepted to by the party making the application;

(8) that the right to have a bill of exceptions has been lost, either through the death or incapacity of the court reporter or in any manner that was not the fault of the losing party.

History: En. Sec. 169, p. 76, Bannack Stat.; amd. Sec. 193, p. 171, L. 1867; re-en. Sec. 233, p. 74, Cod. Stat. 1871; amd. Sec. 285, p. 111, L. 1877; re-en. Sec. 285, 1st Div. Rev. Stat. 1879; amd. Sec. 7, p. 10, L. 1881; re-en. Sec. 296, 1st Div. Comp. Stat. 1887; re-en. Sec. 1171, C. Civ. Proc. 1895; re-en. Sec. 6794, Rev. C. 1907; re-en. Sec. 9397, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 657; amd. Sec. 1, Ch. 68, L. 1935; re-en. Sec. 9397, R.C.M. 1935; R.C.M. 1947, 93-5603.

25-11-103. Grounds after trial by the court. No new trial shall be granted in equity cases or in cases tried by the court without a jury, except on the grounds mentioned in subsections (1), (3), and (4) of 25-11-102.

History: En. Sec. 5, Ch. 225, L. 1921; re-en. Sec. 9396, R.C.M. 1921; re-en. Sec. 9396, R.C.M. 1935; R.C.M. 1947, 93-5602.

25-11-104. How motion for new trial made. (1) Motions for new trials shall be made as follows:

(a) For causes mentioned in 25-11-102(1), the motion shall be made on affidavits or on the minutes of the court.

(b) For causes mentioned in subsection (2), (3), (4), or (8) of 25-11-102, the motion shall be made only on affidavits.

(c) For causes mentioned in subsection (5), (6), or (7) of 25-11-102, the motion shall be made only on the minutes of the court.

(2) The official stenographic reports of the trial may be referred to as a part of the minutes of the court.

History: En. Sec. 170, p. 77, Bannack Stat.; re-en. Sec. 234, p. 75, Cod. Stat. 1871; amd. Sec. 286, p. 112, L. 1877; re-en. Sec. 286, 1st Div. Rev. Stat. 1879; re-en. Sec. 297, 1st Div. Comp. Stat. 1887; re-en. Sec. 1172, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 41, L. 1907; Sec. 6795, Rev. C. 1907; amd. Sec. 6, Ch. 225, L. 1921; re-en. Sec. 9398, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 658; amd. Sec. 2, Ch. 68, L. 1935; re-en. Sec. 9398, R.C.M. 1935; R.C.M. 1947, 93-5604.

CHAPTER 12

APPEAL TO SUPREME COURT

Part 1 — General Provisions

Section

25-12-101. Exclusive method of review.
25-12-102. Cases in which appeal may be taken.

Part 1

General Provisions

25-12-101. Exclusive method of review. A judgment or order in a civil action, except when expressly made final by this code, may be reviewed as prescribed by the Rules of Appellate Civil Procedure and not otherwise.

History: En. Sec. 248, p. 94, Bannack Stat.; re-en. Sec. 317, p. 199, L. 1867; re-en. Sec. 366, p. 107, Cod. Stat. 1871; re-en. Sec. 405, p. 149, L. 1877; re-en. Sec. 405, 1st Div. Rev. Stat. 1879; re-en. Sec. 418, 1st Div. Comp. Stat. 1887; re-en. Sec. 1720, C. Civ. Proc. 1895; re-en. Sec. 7096, Rev. C. 1907; re-en. Sec. 9729, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 936; re-en. Sec. 9729, R.C.M. 1935; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966; R.C.M. 1947, 93-8001(part).

25-12-102. Cases in which appeal may be taken. A party aggrieved may appeal in the cases prescribed in the Rules of Appellate Civil Procedure.

History: En. Sec. 248, p. 94, Bannack Stat.; amd. Sec. 319, p. 199, L. 1867; re-en. Sec. 368, p. 107, Cod. Stat. 1871; re-en. Sec. 407, p. 150, L. 1877; re-en. Sec. 407, 1st Div. Rev. Stat. 1879; re-en. Sec. 420, 1st Div. Comp. Stat. 1887; re-en. Sec. 1721, C. Civ. Proc. 1895; re-en. Sec. 7097, Rev. C. 1907; re-en. Sec. 9730, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 938; re-en. Sec. 9730, R.C.M. 1935; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966; R.C.M. 1947, 93-8002(part).

CHAPTER 13

EXECUTION OF JUDGMENT

Part 1 — Right to Enforcement of Judgment

Section

25-13-101. Time limit for issuing execution.
25-13-102. Execution after six years.
25-13-103. Execution after death of a party.
25-13-104. Compelling contribution or repayment — joint debtor, surety.
25-13-105. Compelling repayment — surety on appeal.

Part 2 — Method of Enforcement

25-13-201. Judgments for money or the possession of property.
25-13-202. Judgments requiring the sale of property.
25-13-203. Judgments requiring the performance of specific acts.
25-13-204. Enforcement of order to pay money.
25-13-205. Judgments against county or county officer.

Part 3 — Contents of Writ

25-13-301. Form and contents of writ.
25-13-302. Execution against principal debtor before surety.
25-13-303. Execution when only some of defendants served.
25-13-304. Execution against property of judgment debtor.
25-13-305. Execution of lien on real property.
25-13-306. Execution against property in hands of representative.
25-13-307. Execution requiring delivery of possession of property.
25-13-308. Execution against person of judgment debtor.

Part 4 — Execution and Return of Writ

25-13-401. To whom execution issued.

25-13-402. How writ executed.
25-13-403. Security for sheriff's costs when property seized.
25-13-404. Return of the execution.
25-13-405. Clerk to record returned execution when levy on real property.

Part 5 — Property Subject to Execution

25-13-501. What property subject to execution.
25-13-502. Debts owed to judgment debtor.
25-13-503. Property claimed by third persons.
25-13-504. Garnishment of public officers.
25-13-505. Personal property subject to a security interest.
25-13-506. Duty of secured party.

Part 6 — Property Exempt From Execution

25-13-601. Waiver of exemptions in unsecured note unenforceable.
25-13-602. Special exemption for persons over sixty.
Sections 25-13-603 through 25-13-610 reserved.
25-13-611. Necessary household property.
25-13-612. Property necessary to carry on trade or profession.
25-13-613. Property necessary to carry out governmental functions.
25-13-614. Earnings of judgment debtor.
25-13-615. Homestead.
25-13-616. Life insurance benefits.
25-13-617. Truck or automobile.

Part 7 — Sale on Execution

25-13-701. Notice of sale on execution.
25-13-702. Penalty for selling without notice or destruction of notice.
25-13-703. Postponement of sale.
25-13-704. Conduct of sale.
25-13-705. Procedure when purchaser refuses to pay.
25-13-706. Rejection of subsequent bids after refusal to pay.
25-13-707. Liability of officer after resale.
25-13-708. Conveyance of personal property capable of manual delivery.
25-13-709. Conveyance of personal property not capable of manual delivery.
25-13-710. Real property — what interest transferred.
25-13-711. Real property — certificate of sale.
25-13-712. Property subject to a security interest — disposition of proceeds, security agreement.
25-13-713. Procedure when sale invalidated, revival of judgment.
25-13-714. Validation of defective judicial sales.

Part 8 — Redemption of Real Property

25-13-801. Who may redeem.
25-13-802. Time for redemption — amount to be paid.
25-13-803. Subsequent redemptions — when permitted, amount paid.
25-13-804. Redemption by stockholder or corporation.
25-13-805. Redemption by debtor from spouse.
25-13-806. Notice of redemption, liens, and taxes and assessments paid.
25-13-807. Papers redemptioner must produce.
25-13-808. To whom redemption money paid.
25-13-809. Effect of redemption by debtor or debtor's spouse — certificate of redemption.
25-13-810. When purchaser entitled to conveyance.
25-13-811. Who to execute conveyance.
Sections 25-13-812 through 25-13-820 reserved.
25-13-821. Possession of lands during redemption period.
25-13-822. Rents and profits during redemption period, accounting.
25-13-823. Restraint of waste during redemption period.

25-13-824. Enjoining injury to property after sale and before conveyance.
25-13-825. Damages for injury to property after sale and before conveyance.

Part 1

Right to Enforcement of Judgment

25-13-101. Time limit for issuing execution. The party in whose favor judgment is given may, at any time within 6 years after the entry thereof, have a writ of execution issued for its enforcement.

History: En. Sec. 183, p. 79, Bannack Stat.; re-en. Sec. 209, p. 176, L. 1867; re-en. Sec. 250, p. 80, Cod. Stat. 1871; amd. Sec. 301, p. 118, L. 1877; re-en. Sec. 301, 1st Div. Rev. Stat. 1879; re-en. Sec. 312, 1st Div. Comp. Stat. 1887; amd. Sec. 1210, C. Civ. Proc. 1895; re-en. Sec. 6813, Rev. C. 1907; re-en. Sec. 9416, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 681; re-en. Sec. 9416, R.C.M. 1935; R.C.M. 1947, 93-5801.

25-13-102. Execution after six years. In all cases, the judgment may be enforced or carried into execution after the lapse of 6 years from the date of its entry by leave of the court, upon motion, or by judgment for that purpose founded upon supplemental pleadings.

History: En. Sec. 7, p. 51, L. 1874; re-en. Sec. 813, 1st Div. Rev. Stat. 1879; re-en. Sec. 349, 1st Div. Comp. Stat. 1887; en. Sec. 1215, C. Civ. Proc. 1895; re-en. Sec. 6818, Rev. C. 1907; re-en. Sec. 9421, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 685; re-en. Sec. 9421, R.C.M. 1935; R.C.M. 1947, 93-5807.

25-13-103. Execution after death of a party. Notwithstanding the death of a party after the judgment, execution thereon may be issued or it may be enforced as follows:

(1) In case of the death of the judgment creditor, it may be enforced upon the application of his executor or administrator or successor in interest.

(2) In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property or the enforcement of a lien thereon, execution may be issued with the same effect as if he were still living.

History: En. Sec. 215, p. 178, L. 1867; re-en. Sec. 256, p. 82, Cod. Stat. 1871; re-en. Sec. 306, p. 120, L. 1877; re-en. Sec. 306, 1st Div. Rev. Stat. 1879; re-en. Sec. 317, 1st Div. Comp. Stat. 1887; re-en. Sec. 1216, C. Civ. Proc. 1895; re-en. Sec. 6819, Rev. C. 1907; re-en. Sec. 9422, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 686; re-en. Sec. 9422, R.C.M. 1935; R.C.M. 1947, 93-5808.

25-13-104. Compelling contribution or repayment — joint debtor, surety. (1) When property liable to an execution against several persons is sold thereon and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of property of one of them or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several and is upon an obligation of one of them as security for another and the surety pays the amount or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal.

(2) In such case, the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment if, within 10 days after his payment, he file with the clerk of the court where judgment was rendered notice

of his payment and claim to contribution or repayment. Upon the filing of such notice, the clerk must make an entry thereof in the margin of the docket.

History: En. Sec. 337, p. 132, L. 1877; re-en. Sec. 337, 1st Div. Rev. Stat. 1879; re-en. Sec. 348, 1st Div. Comp. Stat. 1887; re-en. Sec. 1242, C. Civ. Proc. 1895; re-en. Sec. 6845, Rev. C. 1907; re-en. Sec. 9451, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 709; re-en. Sec. 9451, R.C.M. 1935; R.C.M. 1947, 93-5843.

25-13-105. Compelling repayment — surety on appeal. Whenever any surety on an undertaking on appeal, executed to stay proceedings upon a money judgment, pays the judgment, either with or without action, after its affirmation by the appellate court, he is substituted to the rights of the judgment creditor and is entitled to control, enforce, and satisfy such judgment in all respects as if he had recovered the same.

History: En. Sec. 1903, C. Civ. Proc. 1895; re-en. Sec. 7197, Rev. C. 1907; re-en. Sec. 9830, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1059; re-en. Sec. 9830, R.C.M. 1935; R.C.M. 1947, 93-8715.

Part 2

Method of Enforcement

25-13-201. Judgments for money or the possession of property. When the judgment is for money or the possession of real or personal property, the same may be enforced by a writ of execution; and if the judgment direct that the defendant be arrested, the execution may issue against the person of the judgment debtor after the return of an execution against his property unsatisfied in whole or in part.

History: En. Sec. 213, p. 177, L. 1867; re-en. Sec. 254, p. 81, Cod. Stat. 1871; en. Sec. 305, p. 120, L. 1877; re-en. Sec. 305, 1st Div. Rev. Stat. 1879; re-en. Sec. 316, 1st Div. Comp. Stat. 1887; re-en. Sec. 1214, C. Civ. Proc. 1895; re-en. Sec. 6817, Rev. C. 1907; re-en. Sec. 9420, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 684; re-en. Sec. 9420, R.C.M. 1935; R.C.M. 1947, 93-5805(part).

25-13-202. Judgments requiring the sale of property. When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment or the material parts thereof and directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith.

History: En. Sec. 213, p. 177, L. 1867; re-en. Sec. 254, p. 81, Cod. Stat. 1871; en. Sec. 305, p. 120, L. 1877; re-en. Sec. 305, 1st Div. Rev. Stat. 1879; re-en. Sec. 316, 1st Div. Comp. Stat. 1887; re-en. Sec. 1214, C. Civ. Proc. 1895; re-en. Sec. 6817, Rev. C. 1907; re-en. Sec. 9420, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 684; re-en. Sec. 9420, R.C.M. 1935; R.C.M. 1947, 93-5805(part).

25-13-203. Judgments requiring the performance of specific acts. (1) When the judgment requires the performance of any other act than those designated in 25-13-201 and 25-13-202, a certified copy of the judgment may be served upon the party against whom the same is rendered or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court.

(2) Where a judgment directs a party to make a deposit or delivery or to convey real property, if the direction is disobeyed, the court, besides punishing the disobedience as a contempt, may by order require the sheriff to take and deposit or

deliver the money or other personal property or to convey the real property in conformity with the direction of the court.

History: (1)En. Sec. 213, p. 177, L. 1867; re-en. Sec. 254, p. 81, Cod. Stat. 1871; en. Sec. 305, p. 120, L. 1877; re-en. Sec. 305, 1st Div. Rev. Stat. 1879; re-en. Sec. 316, 1st Div. Comp. Stat. 1887; re-en. Sec. 1214, C. Civ. Proc. 1895; re-en. Sec. 6817, Rev. C. 1907; re-en. Sec. 9420, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 684; re-en. Sec. 9420, R.C.M. 1935; Sec. 93-5805, R.C.M. 1947; (2)En. Sec. 229, P. 95, L. 1877; re-en. Sec. 229, 1st Div. Rev. Stat. 1879; re-en. Sec. 237, 1st Div. Comp. Stat. 1887; amd. Sec. 972, C. Civ. Proc. 1895; re-en. Sec. 6707, Rev. C. 1907; re-en. Sec. 9310, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 574; re-en. Sec. 9310, R.C.M. 1935; Sec. 93-4504, R.C.M. 1947; R.C.M. 1947, 93-4504(part), 93-5805(part).

25-13-204. Enforcement of order to pay money. Whenever an order for the payment of a sum of money is made by a court or judge pursuant to the provisions of this code, it may be enforced by execution in the same manner as if it were a judgment.

History: En. Sec. 473, p. 166, L. 1877; re-en. Sec. 473, 1st Div. Rev. Stat. 1879; re-en. Sec. 486, 1st Div. Comp. Stat. 1887; re-en. Sec. 1825, C. Civ. Proc. 1895; re-en. Sec. 7144, Rev. C. 1907; re-en. Sec. 9777, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1007; re-en. Sec. 9777, R.C.M. 1935; R.C.M. 1947, 93-5806.

25-13-205. Judgments against county or county officer. When a judgment is rendered against the county or against any county officer in an action prosecuted against him in his name of office, when the same is to be paid by the county, no execution must issue upon the judgment, but the same must be paid as other county charges. When so collected, the same must be paid by the county treasurer to the proper person to whom the same is adjudged, upon the delivery of a proper voucher therefor.

History: En. Sec. 342, 5th Div. Rev. Stat. 1879; re-en. Sec. 751, 5th Div. Comp. Stat. 1887; amd. Sec. 4199, Pol. C. 1895; re-en. Sec. 2879, Rev. C. 1907; re-en. Sec. 4450, R.C.M. 1921; re-en. Sec. 4450, R.C.M. 1935; R.C.M. 1947, 16-811.

Part 3

Contents of Writ

25-13-301. Form and contents of writ. (1) The writ of execution must:

(a) be issued in the name of the state of Montana, sealed with the seal of the court, and subscribed by the clerk;

(b) be directed to the sheriff;

(c) intelligibly refer to the judgment, stating the court, the county where the judgment roll is filed, and if it be for money, the amount thereof and the amount actually due thereon; and

(d) require the sheriff to act substantially as provided in this part.

(2) In executions, the amount thereof must be computed and stated as near as may be in dollars and cents, rejecting fractions of a cent.

History: (1)En. Sec. 184, p. 79, Bannack Stat.; re-en. Sec. 210, p. 176, L. 1867; re-en. Sec. 251, p. 80, Cod. Stat. 1871; re-en. Sec. 302, p. 118, L. 1877; re-en. Sec. 302, 1st Div. Rev. Stat. 1879; re-en. Sec. 313, 1st Div. Comp. Stat. 1887; amd. Sec. 1211, C. Civ. Proc. 1895; re-en. Sec. 6814, Rev. C. 1907; re-en. Sec. 9417, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 682; re-en. Sec. 9417, R.C.M. 1935; Sec. 93-5802, R.C.M. 1947; (2)En. Sec. 3152, Pol. C. 1895; re-en. Sec. 2035, Rev. C. 1907; re-en. Sec. 4285, R.C.M. 1921; Cal. Pol. C. Sec. 3274; re-en. Sec. 4285, R.C.M. 1935; Sec. 93-4710, R.C.M. 1947; R.C.M. 1947, 93-4710(part), 93-5802(part).

25-13-302. Execution against principal debtor before surety. Upon the rendition of any judgment, if it shall be shown that one or more of the defendants against whom the judgment is to be rendered are principal debtors and others of the said defendants are sureties of such principal debtor, the court may order the judgment so to state, and upon the issuance of an execution upon such judgment, it shall direct the sheriff to make the amount due thereon out of the goods and chattels, lands and tenements of the principal debtor or debtors or, if sufficient thereof cannot be found within his county to satisfy the same, to levy and make the same out of the property, personal or real, of the judgment debtor who was surety.

History: En. Sec. 118, p. 67, Bannack Stat.; re-en. Sec. 145, p. 161, L. 1867; re-en. Sec. 181, p. 62, Cod. Stat. 1871; re-en. Sec. 231, p. 95, L. 1877; re-en. Sec. 231, 1st. Div. Rev. Stat. 1879; re-en. Sec. 239, 1st Div. Comp. Stat. 1887; re-en. Sec. 1001, C. Civ. Proc. 1895; re-en. Sec. 6711, Rev. C. 1907; re-en. Sec. 9314, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 578; re-en. Sec. 9314, R.C.M. 1935; R.C.M. 1947, 93-4702(part).

25-13-303. Execution when only some of defendants served. When a writ of execution is issued on a judgment recovered against two or more persons in an action upon a joint contract, in which action all the defendants were not served with summons or did not appear, it must direct the sheriff to satisfy the judgment out of the joint property of all the defendants and the individual property only of the defendants who were served or who appeared in the action.

History: En. Sec. 185, p. 80, Bannack Stat.; amd. Sec. 211, p. 177, L. 1867; re-en. Sec. 252, p. 81, Cod. Stat. 1871; re-en. Sec. 303, p. 119, L. 1877; re-en. Sec. 303, 1st Div. Rev. Stat. 1879; re-en. Sec. 314, 1st Div. Comp. Stat. 1887; re-en. Sec. 1212, C. Civ. Proc. 1895; re-en. Sec. 6815, Rev. C. 1907; re-en. Sec. 9418, R.C.M. 1921; re-en. Sec. 9418, R.C.M. 1935; R.C.M. 1947, 93-5803.

25-13-304. Execution against property of judgment debtor. If the writ be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor and, if sufficient personal property cannot be found, out of his real property.

History: En. Sec. 184, p. 79, Bannack Stat.; re-en. Sec. 210, p. 176, L. 1867; re-en. Sec. 251, p. 80, Cod. Stat. 1871; re-en. Sec. 302, p. 118, L. 1877; re-en. Sec. 302, 1st Div. Rev. Stat. 1879; re-en. Sec. 313, 1st Div. Comp. Stat. 1887; amd. Sec. 1211, C. Civ. Proc. 1895; re-en. Sec. 6814, Rev. C. 1907; re-en. Sec. 9417, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 682; re-en. Sec. 9417, R.C.M. 1935; R.C.M. 1947, 93-5802(part).

25-13-305. Execution of lien on real property. If the judgment be a lien upon real property, the writ shall require the sheriff to satisfy the judgment, with interest, out of the real property belonging to the judgment debtor on the day when the judgment was docketed or at any time thereafter or, if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the clerk of the district court of such county, stating such day, or any time thereafter.

History: En. Sec. 184, p. 79, Bannack Stat.; re-en. Sec. 210, p. 176, L. 1867; re-en. Sec. 251, p. 80, Cod. Stat. 1871; re-en. Sec. 302, p. 118, L. 1877; re-en. Sec. 302, 1st Div. Rev. Stat. 1879; re-en. Sec. 313, 1st Div. Comp. Stat. 1887; amd. Sec. 1211, C. Civ. Proc. 1895; re-en. Sec. 6814, Rev. C. 1907; re-en. Sec. 9417, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 682; re-en. Sec. 9417, R.C.M. 1935; R.C.M. 1947, 93-5802(part).

25-13-306. Execution against property in hands of representative. If the writ be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment, with interest, out of such property.

History: En. Sec. 184, p. 79, Bannack Stat.; re-en. Sec. 210, p. 176, L. 1867; re-en. Sec. 251, p. 80, Cod. Stat. 1871; re-en. Sec. 302, p. 118, L. 1877; re-en. Sec. 302, 1st Div. Rev. Stat. 1879; re-en. Sec. 313, 1st Div. Comp. Stat. 1887; amd. Sec. 1211, C. Civ. Proc. 1895; re-en. Sec. 6814, Rev. C. 1907; re-en. Sec. 9417, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 682; re-en. Sec. 9417, R.C.M. 1935; R.C.M. 1947, 93-5802(2).

25-13-307. Execution requiring delivery of possession of property. If the writ be for the delivery of the possession of real or personal property, it must require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto and may at any time require the sheriff to satisfy any costs, damages, rents, or profits recovered by the same judgment out of the personal property of the person against whom it was rendered, the value of the property for which the judgment was rendered to be specified therein, if a delivery cannot be had, and if sufficient personal property cannot be found, then out of the real property, as provided in 25-13-305.

History: En. Sec. 184, p. 79, Bannack Stat.; re-en. Sec. 210, p. 176, L. 1867; re-en. Sec. 251, p. 80, Cod. Stat. 1871; re-en. Sec. 302, p. 118, L. 1877; re-en. Sec. 302, 1st Div. Rev. Stat. 1879; re-en. Sec. 313, 1st Div. Comp. Stat. 1887; amd. Sec. 1211, C. Civ. Proc. 1895; re-en. Sec. 6814, Rev. C. 1907; re-en. Sec. 9417, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 682; re-en. Sec. 9417, R.C.M. 1935; R.C.M. 1947, 93-5802(4).

25-13-308. Execution against person of judgment debtor. If the writ be against the person of the judgment debtor, it must require the sheriff to arrest such debtor and commit him to the jail of the county until he pay the judgment, with interest, or be discharged, according to law.

History: En. Sec. 184, p. 79, Bannack Stat.; re-en. Sec. 210, p. 176, L. 1867; re-en. Sec. 251, p. 80, Cod. Stat. 1871; re-en. Sec. 302, p. 118, L. 1877; re-en. Sec. 302, 1st Div. Rev. Stat. 1879; re-en. Sec. 313, 1st Div. Comp. Stat. 1887; amd. Sec. 1211, C. Civ. Proc. 1895; re-en. Sec. 6814, Rev. C. 1907; re-en. Sec. 9417, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 682; re-en. Sec. 9417, R.C.M. 1935; R.C.M. 1947, 93-5802(3).

Part 4

Execution and Return of Writ

25-13-401. To whom execution issued. Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in the state. Where it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property or some part thereof is situated. Executions may be issued at the same time to different counties.

History: En. Sec. 216, p. 178, L. 1867; re-en. Sec. 257, p. 82, Cod. Stat. 1871; re-en. Sec. 307, p. 120, L. 1877; re-en. Sec. 307, 1st Div. Rev. Stat. 1879; re-en. Sec. 318, 1st Div. Comp. Stat. 1887; re-en. Sec. 1217, C. Civ. Proc. 1895; re-en. Sec. 6820, Rev. C. 1907; re-en. Sec. 9423, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 687; re-en. Sec. 9423, R.C.M. 1935; R.C.M. 1947, 93-5809.

25-13-402. How writ executed. The sheriff must execute the writ against the property of the judgment debtor by levying on a sufficient amount of property, if there be sufficient, collecting or selling the things in action, and selling the other property and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the sheriff, he must levy only on such part of the property as the judgment debtor may indicate if the property indicated be amply sufficient to satisfy the judgment and costs.

History: En. Sec. 198, p. 83, Bannack Stat.; re-en. Sec. 220, p. 180, L. 1867; re-en. Sec. 270, p. 85, Cod. Stat. 1871; amd. Sec. 320, p. 125, L. 1877; re-en. Sec. 320, 1st Div. Rev. Stat. 1879; re-en. Sec. 331, 1st Div. Comp. Stat. 1887; re-en. Sec. 1224, C. Civ. Proc. 1895; re-en. Sec. 6827, Rev. C. 1907; re-en. Sec. 9431, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 691; re-en. Sec. 9431, R.C.M. 1935; R.C.M. 1947, 93-5823.

25-13-403. Security for sheriff's costs when property seized. If the sheriff will incur substantial costs in transporting, keeping, or storing the property seized, the party requesting service of a writ of execution shall provide a bond or other security to pay for all costs which may be incurred as a result of the service of such writ.

History: En. Sec. 4393, Pol. C. 1895; re-en. Sec. 3022, Rev. C. 1907; re-en. Sec. 4786, R.C.M. 1921; Cal. Pol. C. Sec. 4185; re-en. Sec. 4786, R.C.M. 1935; amd. Sec. 1, Ch. 426, L. 1977; R.C.M. 1947, 16-2714(part).

25-13-404. Return of the execution. The execution may be made returnable, at any time not less than 10 or more than 60 days after its receipt by the sheriff, to the clerk with whom the judgment roll is filed. When the execution is returned, the clerk must attach it to the judgment roll.

History: En. Sec. 212, p. 177, L. 1867; re-en. Sec. 253, p. 81, Cod. Stat. 1871; amd. Sec. 20, p. 57, L. 1874; re-en. Sec. 304, p. 119, L. 1877; re-en. Sec. 304, 1st Div. Rev. Stat. 1879; re-en. Sec. 315, 1st Div. Comp. Stat. 1887; re-en. Sec. 1213, C. Civ. Proc. 1895; re-en. Sec. 6816, Rev. C. 1907; re-en. Sec. 9419, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 683; re-en. Sec. 9419, R.C.M. 1935; R.C.M. 1947, 93-5804(part).

25-13-405. Clerk to record returned execution when levy on real property. If any real estate be levied upon, the clerk must record the execution and the return thereto at large and certify the same under his hand as true copies in a book to be called the "execution book", which must be indexed, with the names of the plaintiffs and defendants in execution alphabetically arranged, and kept open at all times during office hours for the inspection of the public, without charge. It is evidence of the contents of the originals whenever they or any part thereof may be destroyed or mutilated.

History: En. Sec. 212, p. 177, L. 1867; re-en. Sec. 253, p. 81, Cod. Stat. 1871; amd. Sec. 20, p. 57, L. 1874; re-en. Sec. 304, p. 119, L. 1877; re-en. Sec. 304, 1st Div. Rev. Stat. 1879; re-en. Sec. 315, 1st Div. Comp. Stat. 1887; re-en. Sec. 1213, C. Civ. Proc. 1895; re-en. Sec. 6816, Rev. C. 1907; re-en. Sec. 9419, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 683; re-en. Sec. 9419, R.C.M. 1935; R.C.M. 1947, 93-5804(part).

Part 5

Property Subject to Execution

25-13-501. What property subject to execution. All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action are liable to execution. Shares and interest in any corporation or company, debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery may be attached on execution, in like manner as upon writs of attachment. Gold dust must be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution.

History: En. Sec. 192, p. 81, Bannack Stat.; amd. Sec. 217, p. 178, L. 1867; re-en. Sec. 258, p. 82, Cod. Stat. 1871; re-en. Sec. 308, p. 121, L. 1877; re-en. Sec. 308, 1st Div. Rev. Stat. 1879; re-en. Sec. 319, 1st Div. Comp. Stat. 1887; re-en. Sec. 1218, C. Civ. Proc. 1895; re-en. Sec. 6821, Rev. C. 1907; re-en. Sec. 9424, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 688; re-en. Sec. 9424, R.C.M. 1935; R.C.M. 1947, 93-5810.

25-13-502. Debts owed to judgment debtor. After the issuing of an execution against property and before its return, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt is sufficient discharge for the amount so paid.

History: En. Sec. 217, p. 88, Bannack Stat.; re-en. Sec. 240, p. 184, L. 1867; re-en. Sec. 289, Cod. Stat. 1871; re-en. Sec. 340, p. 134, L. 1877; re-en. Sec. 340, 1st Div. Rev. Stat. 1879; re-en. Sec. 352, 1st Div. Comp. Stat. 1887; re-en. Sec. 1262, C. Civ. Proc. 1895; re-en. Sec. 6850, Rev. C. 1907; re-en. Sec. 9456, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 716; re-en. Sec. 9456, R.C.M. 1935; R.C.M. 1947, 93-5903.

25-13-503. Property claimed by third persons. If personal property levied upon be claimed by a third person, the same proceedings shall be had as provided in attachment in 27-18-602.

History: En. Sec. 1220, C. Civ. Proc. 1895; re-en. Sec. 6823, Rev. C. 1907; re-en. Sec. 9426, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 689; re-en. Sec. 9426, R.C.M. 1935; R.C.M. 1947, 93-5812.

25-13-504. Garnishment of public officers. The provisions of 27-18-406, relating to the garnishment of public officers, apply to the levy of an execution.

History: En. Sec. 1243, C. Civ. Proc. 1895; re-en. Sec. 6846, Rev. C. 1907; re-en. Sec. 9452, R.C.M. 1921; re-en. Sec. 9452, R.C.M. 1935; R.C.M. 1947, 93-5844.

25-13-505. Personal property subject to a security interest. Personal property subject to a security interest may be taken on execution issued at the suit of a creditor of the debtor under the security agreement; but before the property is so taken, the officer levying the writ must pay or tender to the secured party the amount of the security agreement debt and interest or must deposit the same with the county treasurer of the county in which the financing statement covering the security agreement is filed, if such statement is filed with a county clerk and recorder, or if such statement is filed with another filing officer pursuant to law, then with such other filing officer, payable to the order of the secured party.

History: En. Sec. 1, Ch. 111, L. 1921; re-en. Sec. 9291, R.C.M. 1921; re-en. Sec. 9291, R.C.M. 1935; amd. Sec. 11-162, Ch. 264, L. 1963; R.C.M. 1947, 93-4338(part).

25-13-506. Duty of secured party. (1) The secured party under any security agreement of record shall, upon 15 days' notice in writing served upon him in person by any creditor of the debtor seeking to satisfy a judgment of such creditor against the debtor, be required to make and file in the office of the county clerk and recorder or other filing officer with whom the financing statement covering the security agreement is filed an affidavit showing the amount of the indebtedness then actually due and owing to the secured party; and such affidavit shall state the amount of the original obligation for which the security agreement was given as security, all additional advancement of money or property on the principal obligation since the date of the execution of the security agreement, all payments of whatsoever kind, whether on principal or interest, made by the debtor to the date of the execution of such affidavit by the secured party, and the balance then remaining due and unpaid to the secured party. If within 15 days from the service of any such demand in writing on the secured party by any creditor of the debtor, the secured party shall fail, refuse, or neglect to file the affidavit herein required, the security agreement shall be of no force or effect as against such creditor upon the seizure of any such personal property on execution.

(2) In the event the amount shown to be due is paid to the county treasurer or to a filing officer, as aforesaid, or to the secured party in satisfaction of the security agreement by any execution creditor against the debtor, the secured party shall be required to surrender to the county treasurer or such filing officer the security agreement and any note or other evidence of indebtedness secured thereby, which security agreement or other evidence of indebtedness shall be delivered by the secured party, county treasurer, or filing officer to the execution creditor.

History: En. Sec. 1, Ch. 111, L. 1921; re-en. Sec. 9291, R.C.M. 1921; re-en. Sec. 9291, R.C.M. 1935; amd. Sec. 11-162, Ch. 264, L. 1963; R.C.M. 1947, 93-4338(part).

Part 6

Property Exempt From Execution

25-13-601. Waiver of exemptions in unsecured note unenforceable. Any waiver of statutory exemption from execution in an unsecured promissory note shall be unenforceable.

History: En. Sec. 1, Ch. 172, L. 1965; R.C.M. 1947, 93-5813.1.

25-13-602. Special exemption for persons over sixty. An unmarried man or woman over the age of 60 years shall be allowed the same exemptions as are granted to the head of a family under the laws of the state of Montana.

History: En. Sec. 1, Ch. 120, L. 1933; re-en. Sec. 9430.1, R.C.M. 1935; R.C.M. 1947, 93-5819.

25-13-603 through 25-13-610 reserved.

25-13-611. Necessary household property. (1) The following property is exempt from execution, except as herein otherwise provided:

(a) all wearing apparel of the judgment debtor and family;

(b) all chairs, tables, desks, and books to the value of $200;

(c) all necessary household, table, and kitchen furniture of the judgment debtor, including one sewing machine, stoves, stovepipes, and stove furniture, heating apparatus, beds, bedding, and bedsteads, and provisions and fuel provided for individual or family use sufficient for 3 months;

(d) 1 horse, saddle, and bridle; 2 cows and their calves; 4 hogs; 50 domestic fowls, and feed for such animals for 3 months;

(e) one clock; and

(f) all family pictures.

(2) An unmarried person who is not the head of a family is not entitled to any of the exemptions herein mentioned, except that of the wearing apparel of the judgment debtor.

(3) None of the property mentioned in this section is exempt from execution issued upon a judgment recovered for its price or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona fide resident of this state shall have the benefit of these exemptions.

History: En. Sec. 1, Ch. 8, L. 1905; re-en. Sec. 6824, Rev. C. 1907; amd. Sec. 1, Ch. 232, L. 1921; re-en. Sec. 9427, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 690; re-en. Sec. 9427, R.C.M. 1935; R.C.M. 1947, 93-5813.

25-13-612. Property necessary to carry on trade or profession. (1) In addition to the property mentioned in 25-13-611, there shall be exempt to all judgment debtors who are married or who are heads of families the following property:

(a) to a farmer: farming utensils or implements of husbandry, not exceeding in value $600; two oxen or two horses or mules and their harness, one cart or wagon, set of sleds, and food for such oxen, horses, cows, or mules for 3 months; all seed, grain, or vegetables actually provided or on hand for the purpose of planting or sowing the following spring, not exceeding in value $200;

(b) to a mechanic or artisan: tools or implements necessary to carry on his trade;

(c) to a surgeon, physician, or dentist: the instruments and chest necessary to the exercise of his profession, with his scientific and professional libraries and necessary office furniture;

(d) to attorneys at law and ministers of the gospel, etc.: the professional libraries of attorneys, counselors, judges, ministers of the gospel, editors, schoolteachers, and music teachers and their necessary office furniture; the musical instruments of music teachers; the notarial seal, records, and office furniture of a notary public;

(e) to a miner: his cabin or dwelling, sluices, and pipes, hose, windlass, derricks, cars, pumps, tools, implements, and appliances necessary for carrying on any kind of mining operations, not exceeding in value the aggregate sum of $1,000; and one horse or mule with harness and food for such horse or mule for 3 months, when such horse or mule is used in working his mine or mining claim;

(f) to a civil, mining, or mechanical engineer: instruments, tools, books, and records necessary to carry on his profession;

(g) to a chemist or assayer: the tools, instruments, and supplies necessary to carry on his profession;

(h) to a cartman, hackman, huckster, peddler, teamster, or laborer: one horse or mule and harness for two animals or two oxen and harness, and one cart or wagon, one dray or truck, one hack or carriage by the use of which such person habitually earns his living;

(i) one vehicle and harness or other equipment used by a physician or surgeon or minister of the gospel in making his professional visits, with food for such horse, mule, or oxen for 3 months;

(j) to an osteopath or chiropractor: the instruments and equipment necessary to the exercise of his profession, with his scientific and professional library and necessary office furniture.

(2) No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona fide resident of this state shall have the benefit of these exemptions. No person can claim more than one of the exemptions mentioned in subsections (1)(a) through (1)(i) of this section.

History: Ap. p. Sec. 1222, C. Civ. Proc. 1895; amd. Sec. 2, Ch. 8, L. 1905; re-en. Sec. 6825, Rev. C. 1907; re-en. Sec. 9428, R.C.M. 1921; re-en. Sec. 9428, R.C.M.

1935; Sec. 93-5814, R.C.M. 1947; Ap. p. Sec. 1, Ch. 127, L. 1937; re-en. Sec. 9428.1, R.C.M. 1935; Sec. 93-5815, R.C.M. 1947; R.C.M. 1947, 93-5814(part), 93-5815.

25-13-613. Property necessary to carry out governmental functions. (1) In addition to the property mentioned in 25-13-611, there shall be exempt to all judgment debtors who are married or who are heads of families the following property:

(a) all fire engines, hooks, and ladders, with the cart, trucks, and carriages, hose, buckets, implements, and apparatus thereto appertaining, and all furniture and uniforms of any fire company or department organized under any laws of this state;

(b) all arms, uniforms, and accouterments required by law to be kept by any person and one gun to be selected by the debtor;

(c) all courthouses, jails, public offices, and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers, and appurtenances belonging and pertaining to the courthouse, jail, and public offices belonging to any county of this state; and

(d) all cemeteries, public squares, parks, and places, public buildings, town halls, public markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining owned or held by any town or incorporated city or dedicated by such city or town to health, ornament, or public use or for the use of any fire or military company organized under the laws of the state.

(2) No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona fide resident of this state shall have the benefit of these exemptions.

History: En. Sec. 1222, C. Civ. Proc. 1895; amd. Sec. 2, Ch. 8, L. 1905; re-en. Sec. 6825, Rev. C. 1907; re-en. Sec. 9428, R.C.M. 1921; re-en. Sec. 9428, R.C.M. 1935; R.C.M. 1947, 93-5814(part).

25-13-614. Earnings of judgment debtor. (1) The earnings of the judgment debtor for his personal services rendered at any time within 45 days next preceding the levy of execution or attachment, when it appears by the debtor's affidavit or otherwise that such earnings are necessary for the use of his family supported in whole or in part by his labor, are exempt; but where debts are incurred by any such person or his wife or family for gasoline and for the common necessaries of life, then the one-half of such earnings are nevertheless subject to execution, garnishment, and attachment to satisfy debts so incurred.

(2) The words "his family", as used in this section, are to be construed with the words "head of family", as used in 70-32-102.

History: En. Sec. 1222, C. Civ. Proc. 1895; re-en. Sec. 6825, Rev. C. 1907; amd. Sec. 1, Ch. 48, L. 1913; re-en. Sec. 9429, R.C.M. 1921; amd. Sec. 1, Ch. 3, L. 1933; re-en. Sec. 9429, R.C.M. 1935; amd. Sec. 1, Ch. 77, L. 1939; R.C.M. 1947, 93-5816.

25-13-615. Homestead. The homestead of a judgment debtor exempt from execution is provided for in Title 70, chapter 32.

History: En. Sec. 1223, C. Civ. Proc. 1895; re-en. Sec. 6826, Rev. C. 1907; re-en. Sec. 9430, R.C.M. 1921; re-en. Sec. 9430, R.C.M. 1935; R.C.M. 1947, 93-5818.

25-13-616. Life insurance benefits. (1) In addition to the property mentioned in 25-13-611, there shall be exempt to all judgment debtors who are married or who are heads of families all moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance on the life of the debtor if the annual premiums paid do not exceed $500.

(2) No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona fide resident of this state shall have the benefit of these exemptions.

History: En. Sec. 1222, C. Civ. Proc. 1895; amd. Sec. 2, Ch. 8, L. 1905; re-en. Sec. 6825, Rev. C. 1907; re-en. Sec. 9428, R.C.M. 1921; re-en. Sec. 9428, R.C.M. 1935; R.C.M. 1947, 93-5814(part).

25-13-617. Truck or automobile. (1) In addition to all other exemptions, one truck or automobile of the value of not more than $300 is exempt from attachment or execution where the debtor is the head of a family or over 60 years of age; but where debts are incurred by any such debtor or his wife or family for the common necessaries of life, then such truck or automobile is nevertheless subject to attachment and execution to satisfy debts so incurred.

(2) The words "his family", as used in this section, are to be construed with the words "head of family", as used in 70-32-102.

History: En. Sec. 2, Ch. 120, L. 1933; re-en. Sec. 9430.2, R.C.M. 1935; amd. Sec. 1, Ch. 48, L. 1941; R.C.M. 1947, 93-5820.

Part 7

Sale on Execution

25-13-701. Notice of sale on execution. (1) Before the sale of the property on execution, notice thereof must be given as follows:

(a) in case of perishable property, by posting written notice of the time and place of the sale in three public places of the township or city where the sale is to take place, for such time as may be reasonable considering the character and condition of the property;

(b) in case of other personal property, by posting a similar notice in three public places in the township or city where the sale is to take place, for not less than 5 days or more than 10 days;

(c) in case of real property, by posting a similar notice, particularly describing the property, for 20 days in three public places of the township or city where the property is situated and also where the property is to be sold, which may be either at the courthouse or on the premises, and publishing a copy thereof once a week for the same period in some newspaper published in the county, if there be one, which notice shall be substantially as follows:

SHERIFF'S SALE

....., Plaintiff,
vs.
....., Defendant,

To be sold at sheriff's sale on the .... day of ...., 19.., at .... (Here insert brief description of property.)

Signed ...., Sheriff

(2) Any sheriff publishing a notice not in accordance with the form set forth in subsection (1)(c) and which shall cost more than such a notice shall not be entitled to any costs for publication of the same but shall be personally liable for the payment of such publication.

History: En. Sec. 199, p. 83, Bannack Stat.; amd. Sec. 221, p. 180, L. 1867; re-en. Sec. 271, p. 86, Cod. Stat. 1871; amd. Sec. 20, p. 57, L. 1874; re-en. Sec. 321, p. 126, L. 1877; re-en. Sec. 321, 1st Div. Rev. Stat. 1879; re-en. Sec. 332, 1st

Div. Comp. Stat. 1887; amd. Sec. 1225, C. Civ. Proc. 1895; re-en. Sec. 6828, Rev. C. 1907; re-en. Sec. 9432, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 692; re-en. Sec. 9432, R.C.M. 1935; R.C.M. 1947, 93-5824.

25-13-702. Penalty for selling without notice or destruction of notice. An officer selling without the notice prescribed by 25-13-701 forfeits $500 to the aggrieved party in addition to his actual damages; and a person willfully taking down or defacing the notice posted, if done before the sale or satisfaction of the judgment (if the judgment be satisfied before sale), forfeits $500.

History: En. Sec. 200, p. 84, Bannack Stat.; re-en. Sec. 222, p. 180, L. 1867; re-en. Sec. 272, p. 86, Cod. Stat. 1871; re-en. Sec. 322, p. 127, L. 1877; re-en. Sec. 322, 1st Div. Rev. Stat. 1879; re-en. Sec. 333, 1st Div. Comp. Stat. 1887; re-en. Sec. 1226, C. Civ. Proc. Sec. 1895; re-en. Sec. 6829, Rev. C. 1907; re-en. Sec. 9433, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 693; re-en. Sec. 9433, R.C.M. 1935; R.C.M. 1947, 93-5825.

25-13-703. Postponement of sale. Good cause therefor appearing, the officer holding the execution may postpone any sale noticed thereunder for a period not exceeding 15 days, by public proclamation at the time and place fixed in the notice of sale and by posting a notice in three public places in the township where the property has previously been noticed to be sold.

History: En. Sec. 1, Ch. 120, L. 1915; re-en. Sec. 9435, R.C.M. 1921; re-en. Sec. 9435, R.C.M. 1935; R.C.M. 1947, 93-5827.

25-13-704. Conduct of sale. (1) All sales of property under execution must be made at auction to the highest bidder, between the hours of 9 a.m. and 5 p.m. After sufficient property has been sold to satisfy the execution, no more can be sold. Neither the officer holding the execution nor his deputy can become a purchaser or be interested in any purchase at such sale.

(2) When the sale is of personal property capable of manual delivery, it must be within view of those who attend the sale and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property consisting of several known lots or parcels, they must be sold separately, or when a portion of such real property is claimed by a third person and he requires it to be sold separately, such portion must be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold when such property consists of several known lots or parcels or of articles which can be sold to advantage separately, and the sheriff must follow such directions.

History: En. Sec. 201, p. 84, Bannack Stat.; amd. Sec. 223, p. 180, L. 1867; re-en. Sec. 273, p. 86, Cod. Stat. 1871; re-en. Sec. 323, p. 127, L. 1877; re-en. Sec. 323, 1st Div. Rev. Stat. 1879; re-en. Sec. 334, 1st Div. Comp. Stat. 1887; re-en. Sec. 1227, C. Civ. Proc. 1895; re-en. Sec. 6830, Rev. C. 1907; re-en. Sec. 9434, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 694; re-en. Sec. 9434, R.C.M. 1935; R.C.M. 1947, 93-5826.

25-13-705. Procedure when purchaser refuses to pay. If a purchaser refuses to pay the amount bid by him for the property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction, and the person refusing to pay the costs which have accrued by reason of his bid shall be deemed guilty of contempt of court and punished accordingly.

History: En. Sec. 202, p. 85, Bannack Stat.; amd. Sec. 224, p. 181, L. 1867; re-en. Sec. 274, p. 86, Cod. Stat. 1871; amd. Sec. 324, p. 127, L. 1877; re-en. Sec. 324, 1st Div. Rev. Stat. 1879; re-en. Sec. 335, 1st Div. Comp. Stat. 1887; en. Sec.

1228, C. Civ. Proc. 1895; re-en. Sec. 6831, Rev. C. 1907; re-en. Sec. 9436, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 695; re-en. Sec. 9436, R.C.M. 1935; R.C.M. 1947, 93-5828.

25-13-706. Rejection of subsequent bids after refusal to pay. When a purchaser refuses to pay, the officer may, in his discretion, thereafter reject any subsequent bid of such purchaser.

History: En. Sec. 325, p. 128, L. 1877; re-en. Sec. 325, 1st Div. Rev. Stat. 1879; re-en. Sec. 336, 1st Div. Comp. Stat. 1887; re-en. Sec. 1229, C. Civ. Proc. 1895; re-en. Sec. 6832, Rev. C. 1907; re-en. Sec. 9437, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 696; re-en. Sec. 9437, R.C.M. 1935; R.C.M. 1947, 93-5829.

25-13-707. Liability of officer after resale. Sections 25-13-705 and 25-13-706 must not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser and the amount collected from the purchaser refusing to pay.

History: En. Sec. 326, p. 128, L. 1877; re-en. Sec. 326, 1st Div. Rev. Stat. 1879; re-en. Sec. 337, 1st Div. Comp. Stat. 1887; re-en. Sec. 1230, C. Civ. Proc. 1895; re-en. Sec. 6833, Rev. C. 1907; re-en. Sec. 9438, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 697; re-en. Sec. 9438, R.C.M. 1935; R.C.M. 1947, 93-5830.

25-13-708. Conveyance of personal property capable of manual delivery. When the purchaser of any personal property capable of manual delivery pays the purchase money, the officer making the sale must deliver to the purchaser the property and, if desired, execute and deliver to him a certificate of the sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

History: En. Sec. 205, p. 85, Bannack Stat.; re-en. Sec. 227, p. 181, L. 1867; re-en. Sec. 277, p. 87, Cod. Stat. 1871; re-en. Sec. 327, p. 128, L. 1877; re-en. Sec. 327, 1st Div. Rev. Stat. 1879; re-en. Sec. 338, 1st Div. Comp. Stat. 1887; amd. Sec. 1231, C. Civ. Proc. 1895; re-en. Sec. 6834, Rev. C. 1907; re-en. Sec. 9439, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 698; re-en. Sec. 9439, R.C.M. 1935; R.C.M. 1947, 93-5831.

25-13-709. Conveyance of personal property not capable of manual delivery. When the purchaser of any personal property not capable of manual delivery pays the purchase money, the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

History: En. Sec. 228, p. 181, L. 1867; re-en. Sec. 278, p. 87, Cod. Stat. 1871; re-en. Sec. 328, p. 128, L. 1877; re-en. Sec. 328, 1st Div. Rev. Stat. 1879; re-en. Sec. 339, 1st Div. Comp. Stat. 1887; amd. Sec. 1232, C. Civ. Proc. 1895; re-en. Sec. 6835, Rev. C. 1907; re-en. Sec. 9440, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 699; re-en. Sec. 9440, R.C.M. 1935; R.C.M. 1947, 93-5832.

25-13-710. Real property — what interest transferred. Upon a sale of real property, the purchaser is substituted to and acquires the right, title, interest, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of 2 years' unexpired term, the sale is absolute. In all other cases, the property is subject to redemption, as provided in part 8 of this chapter.

History: En. Sec. 229, p. 181, L. 1867; re-en. Sec. 279, p. 87, Cod. Stat. 1871; re-en. Sec. 329, p. 128, L. 1877; re-en. Sec. 329, 1st Div. Rev. Stat. 1879; re-en. Sec. 340, 1st Div. Comp. Stat. 1887; re-en. Sec. 1233, C. Civ. Proc. 1895; re-en.

Sec. 6836, Rev. C. 1907; re-en. Sec. 9441, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 700; re-en. Sec. 9441, R.C.M. 1935; R.C.M. 1947, 93-5833(part).

25-13-711. Real property — certificate of sale. (1) Upon a sale of real property, the officer must give to the purchaser a certificate of sale, containing:

(a) a particular description of the property sold;

(b) the price bid for each distinct lot or parcel;

(c) the whole price paid;

(d) when subject to redemption, a statement to that effect.

(2) A duplicate of such certificate must be filed by the officer in the office of the county clerk.

History: En. Sec. 229, p. 181, L. 1867; re-en. Sec. 279, p. 87, Cod. Stat. 1871; re-en. Sec. 329, p. 128, L. 1877; re-en. Sec. 329, 1st Div. Rev. Stat. 1879; re-en. Sec. 340, 1st Div. Comp. Stat. 1887; re-en. Sec. 1233, C. Civ. Proc. 1895; re-en. Sec. 6836, Rev. C. 1907; re-en. Sec. 9441, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 700; re-en. Sec. 9441, R.C.M. 1935; R.C.M. 1947, 93-5833(part).

25-13-712. Property subject to a security interest — disposition of proceeds, security agreement. (1) When the property taken under 25-13-505 is sold under process, the officer levying the writ must apply the proceeds of the sale as follows:

(a) to the repayment of the sum paid to the secured party, with interest from the date of such payment; and

(b) the balance, if any, in like manner as the proceeds of sales under execution are applied in other cases.

(2) In the event the property is sold under execution, such creditor shall be required to deliver to the debtor the security agreement and any note or other evidence of indebtedness secured thereby obtained from the secured party when the property is sold for the amount of the indebtedness under the security agreement or an amount in excess thereof.

History: En. Sec. 1, Ch. 111, L. 1921; re-en. Sec. 9291, R.C.M. 1921; re-en. Sec. 9291, R.C.M. 1935; amd. Sec. 11-162, Ch. 264, L. 1963; R.C.M. 1947, 93-4338(part).

25-13-713. Procedure when sale invalidated, revival of judgment. (1) If the purchaser of real property sold on execution or his successor in interest be evicted therefrom in consequence of irregularities in the proceedings concerning the sale or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor.

(2) If the purchaser of property at sheriff's sale or his successor in interest fail to recover possession in consequence of irregularity in the proceedings concerning the sale or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on petition of such party in interest or his attorney, revive the original judgment for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore. When so revived, the said judgment shall have the same effect as an original judgment of the said court of that date, bearing interest as aforesaid; and any other or after-acquired property, rents, issues, or profits of the said debtor shall be liable to levy and sale under execution in satisfaction of such debt, but no property of such debtor sold bona fide before the filing of such petition shall be subject to the lien of said judgment. The notice of the filing of such petition shall be made by filing a notice thereof in the office of the county clerk where such property may be situated, and said judgment shall be revived in the name of the original plaintiff or plaintiffs for the use of said petitioner, the party in interest.

History: En. Sec. 237, p. 183, L. 1867; re-en. Sec. 286, p. 89, Cod. Stat. 1871; re-en. Sec. 336, p. 132, L. 1877; re-en. Sec. 336, 1st Div. Rev. Stat. 1879; re-en.

Sec. 347, 1st Div. Comp. Stat. 1887; re-en. Sec. 1241, C. Civ. Proc. 1895; re-en. Sec. 6844, Rev. C. 1907; re-en. Sec. 9450, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 708; re-en. Sec. 9450, R.C.M. 1935; R.C.M. 1947, 93-5842.

25-13-714. Validation of defective judicial sales. All judicial sales of real property prior to January 1, 1973, provided no action is pending on July 1, 1973, to set such sale aside, where made in this state on proceedings to satisfy valid judgments or decrees of any court and the moneys bidden thereon paid to the officer making such sale, shall be valid and sufficient in law to sustain a sheriff's deed based on such sale and, when no such deed has been executed, shall entitle such purchaser to such deed; and such deed, if now or when executed, shall be sufficient to convey all the title of the judgment debtor at the time of such sale in the premises so sold to the purchaser at said sale, and all defects or irregularities in the issuance of execution, the manner of making or conducting the sale, or the recitals or references in such deed shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity.

History: En. Sec. 1, Ch. 80, L. 1973; R.C.M. 1947, 93-5846.

Part 8

Redemption of Real Property

25-13-801. Who may redeem. (1) Property sold subject to redemption, as provided by 25-13-710, or any part sold separately may be redeemed in the manner hereinafter provided by the following persons or their successors in interest:

(a) the judgment debtor, the judgment debtor's spouse, or his successor in interest in the whole or any part of the property and, if the judgment debtor or successor be a corporation, a stockholder thereof;

(b) a creditor having a lien by judgment, mortgage, or attachment on the property sold or on some share or part thereof subsequent to that on which the property is sold. If a corporation be such creditor, then any stockholder thereof may redeem.

(2) The persons mentioned in subsection (1)(b) of this section are, in this part, termed "redemptioners".

History: En. Sec. 230, p. 181, L. 1867; re-en. Sec. 280, p. 87, Cod. Stat. 1871; re-en. Sec. 330, p. 129, L. 1877; re-en. Sec. 330, 1st Div. Rev. Stat. 1879; re-en. Sec. 341, 1st Div. Comp. Stat. 1887; amd. Sec. 1234, C. Civ. Proc. 1895; re-en. Sec. 6837, Rev. C. 1907; amd. Sec. 1, Ch. 107, L. 1913; re-en. Sec. 9442, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 701; amd. Sec. 1, Ch. 16, L. 1927; re-en. Sec. 9442, R.C.M. 1935; amd. Sec. 55, Ch. 535, L. 1975; R.C.M. 1947, 93-5834.

25-13-802. Time for redemption — amount to be paid. The judgment debtor or redemptioner may redeem the property from the purchaser any time within 1 year after the sale on paying the purchaser:

(1) the amount of his purchase with ½ of 1% per month thereon in addition, up to the time of redemption;

(2) the amount of any assessment or taxes which the purchaser may have paid thereon after purchase and interest on such amount; and

(3) if the purchaser be also a creditor having a prior lien to that of the redemptioner other than the judgment under which such purchase was made, the amount of such lien with interest.

History: En. Sec. 231, p. 181, L. 1867; re-en. Sec. 281, p. 88, Cod. Stat. 1871; amd. Sec. 331, p. 129, L. 1877; re-en. Sec. 331, 1st Div. Rev. Stat. 1879; re-en. Sec. 342, 1st Div. Comp. Stat. 1887; amd. Sec. 1235, C. Civ. Proc. 1895; re-en. Sec.

6838, Rev. C. 1907; re-en. Sec. 9443, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 702; re-en. Sec. 9443, R.C.M. 1935; amd. Sec. 1, Ch. 103, L. 1937; R.C.M. 1947, 93-5835.

25-13-803. Subsequent redemptions — when permitted, amount paid. (1) If property be so redeemed by a redemptioner, another redemptioner may, within 60 days after the last redemption, again redeem it from the last redemptioner on paying the sum on such last redemption with interest thereon at the rate of ½ of 1% per month in addition, the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him with like interest on such amount, and the amount of any liens held by the said last redemptioner prior to his own, with interest; but the judgment under which the property was so sold need not be so paid as a lien. The property may be again, and as often as any redemptioner is so disposed, redeemed from any previous redemptioner, within 60 days after the last redemption, on paying the sum paid on the last previous redemption with interest thereon at the rate of ½ of 1% per month, the amount of any assessment or taxes which the last previous redemptioner paid after the redemption by him with like interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with like interest.

(2) If the judgment debtor or the judgment debtor's spouse redeem, the judgment debtor or the spouse must make the same payments as are required to effect a redemption by a redemptioner.

History: En. Sec. 232, p. 182, L. 1867; re-en. Sec. 282, p. 88, Cod. Stat. 1871; amd. Sec. 332, p. 129, L. 1877; re-en. Sec. 332, 1st Div. Rev. Stat. 1879; re-en. Sec. 343, 1st Div. Comp. Stat. 1887; amd. Sec. 1236, C. Civ. Proc. 1895; re-en. Sec. 6839, Rev. C. 1907; en. Sec. 2, Ch. 107, L. 1913; re-en. Sec. 9444, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 703; amd. Sec. 2, Ch. 16, L. 1927; re-en. Sec. 9444, R.C.M. 1935; amd. Sec. 2, Ch. 103, L. 1937; amd. Sec. 56, Ch. 535, L. 1975; R.C.M. 1947, 93-5836(part).

25-13-804. Redemption by stockholder or corporation. (1) If a stockholder of a corporation redeems, the corporation, within 1 year after the date of sale, may redeem by paying to the redemptioner or the sheriff for his benefit the amount paid to effect the redemption, with interest thereon at the rate of ½ of 1% per month from the date of redemption until the date of such payment, together with any taxes or assessments that may have been paid by the redemptioner, with like interest thereon.

(2) When a stockholder redeems, any other stockholder or stockholders may, at any time after such redemption and within 60 days after the expiration of 1 year from the date of sale, contribute to the redemption by paying to the redeeming stockholder or depositing with the sheriff for his benefit a sum which bears the same proportion to the amount necessary to redeem which the number of shares owned by such contributing stockholder or stockholders bears to the number of shares of such corporation outstanding, with interest on such sum from the date of redemption until the date of contribution at the rate of ½ of 1% per month, together with a like proportion of the taxes or assessments paid by such redeeming stockholder, with like interest thereon; and if the corporation does not redeem the property within the time and in the manner and form as aforesaid, the said redeeming and contributing stockholders shall be entitled to receive a sheriff's deed for such property so redeemed and shall succeed to the said property as tenants in common in such proportions, respectively, as they shall respectively pay or contribute to such redemption as aforesaid. The redeeming or contributing stockholder shall, in all cases when applying to redeem or contribute as aforesaid, present an

affidavit setting forth the number of shares of stock owned by him and, to the best of his knowledge, the number of shares of stock of the corporation outstanding.

History: En. Sec. 232, p. 182, L. 1867; re-en. Sec. 282, p. 88, Cod. Stat. 1871; amd. Sec. 332, p. 129, L. 1877; re-en. Sec. 332, 1st Div. Rev. Stat. 1879; re-en. Sec. 343, 1st Div. Comp. Stat. 1887; amd. Sec. 1236, C. Civ. Proc. 1895; re-en. Sec. 6839, Rev. C. 1907; en. Sec. 2, Ch. 107, L. 1913; re-en. Sec. 9444, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 703; amd. Sec. 2, Ch. 16, L. 1927; re-en. Sec. 9444, R.C.M. 1935; amd. Sec. 2, Ch. 103, L. 1937; amd. Sec. 56, Ch. 535, L. 1975; R.C.M. 1947, 93-5836(3).

25-13-805. Redemption by debtor from spouse. If the spouse of a judgment debtor redeem, the judgment debtor, within 1 year after the date of sale, may redeem by paying the spouse or the spouse's successors in interest or the sheriff for the benefit of the spouse or the successors in interest of the spouse the amount paid to effect the redemption, with interest thereon at the rate of ½ of 1% per month from the date of redemption until the date of such payment, together with any taxes or assessments that may have been paid by the spouse or the successors in interest of the spouse, with like interest thereon.

History: En. Sec. 232, p. 182, L. 1867; re-en. Sec. 282, p. 88, Cod. Stat. 1871; amd. Sec. 332, p. 129, L. 1877; re-en. Sec. 332, 1st Div. Rev. Stat. 1879; re-en. Sec. 343, 1st Div. Comp. Stat. 1887; amd. Sec. 1236, C. Civ. Proc. 1895; re-en. Sec. 6839, Rev. C. 1907; en. Sec. 2, Ch. 107, L. 1913; re-en. Sec. 9444, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 703; amd. Sec. 2, Ch. 16, L. 1927; re-en. Sec. 9444, R.C.M. 1935; amd. Sec. 2, Ch. 103, L. 1937; amd. Sec. 56, Ch. 535, L. 1975; R.C.M. 1947, 93-5836(4).

25-13-806. Notice of redemption, liens, and taxes and assessments paid. Written notice of redemption must be given to the sheriff and a duplicate filed with the county clerk, and if any taxes or assessments are paid by the redemptioner or if he has or acquired any liens other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed with the county clerk, and if such notice be not filed, the property may be redeemed without paying such tax, assessments, or lien.

History: En. Sec. 232, p. 182, L. 1867; re-en. Sec. 282, p. 88, Cod. Stat. 1871; amd. Sec. 332, p. 129, L. 1877; re-en. Sec. 332, 1st Div. Rev. Stat. 1879; re-en. Sec. 343, 1st Div. Comp. Stat. 1887; amd. Sec. 1236, C. Civ. Proc. 1895; re-en. Sec. 6839, Rev. C. 1907; en. Sec. 2, Ch. 107, L. 1913; re-en. Sec. 9444, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 703; amd. Sec. 2, Ch. 16, L. 1927; re-en. Sec. 9444, R.C.M. 1935; amd. Sec. 2, Ch. 103, L. 1937; amd. Sec. 56, Ch. 535, L. 1975; R.C.M. 1947, 93-5836(part).

25-13-807. Papers redemptioner must produce. A redemptioner must produce, to the officer or person from whom he seeks to redeem, and serve with his notice to the sheriff:

(1) a copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court or by the clerk of the district court in the county where the judgment is docketed; or if he redeem upon a mortgage or other lien, a note of the record thereof, certified by the county clerk; or if upon an attachment, a copy of the affidavit of attachment, certified by the clerk of the district court;

(2) a copy of any assignment necessary to establish his claim, verified by the affidavit of himself or of a subscribing witness thereto;

(3) an affidavit by himself or his agent showing the amount then actually due upon the lien.

History: En. Sec. 234, p. 182, L. 1867; re-en. Sec. 284, p. 88, Cod. Stat. 1871; re-en. Sec. 334, p. 131, L. 1877; re-en. Sec. 334, 1st Div. Rev. Stat. 1879; re-en.

Sec. 345, 1st Div. Comp. Stat. 1887; amd. Sec. 1238, C. Civ. Proc. 1895; re-en. Sec. 6841, Rev. C. 1907; re-en. Sec. 9446, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 705; re-en. Sec. 9446, R.C.M. 1935; R.C.M. 1947, 93-5838.

25-13-808. To whom redemption money paid. The payment mentioned in 25-13-802 through 25-13-806 may be made to the purchaser or redemptioner, as the case may be, or for him to the officer who made the sale or, in case his term of office has expired, to his successor in office.

History: En. Sec. 233, p. 182, L. 1867; en. Sec. 283, p. 88, Cod. Stat. 1871; re-en. Sec. 333, p. 129, L. 1877; re-en. Sec. 333, 1st Div. Rev. Stat. 1879; re-en. Sec. 344, 1st Div. Comp. Stat. 1887; re-en. Sec. 1237, C. Civ. Proc. 1895; re-en. Sec. 6840, Rev. C. 1907; re-en. Sec. 9445, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 704; re-en. Sec. 9445, R.C.M. 1935; R.C.M. 1947, 93-5837(part).

25-13-809. Effect of redemption by debtor or debtor's spouse — certificate of redemption. (1) If the debtor redeem, the effect of the sale is terminated and the debtor is restored to his own estate. If the spouse redeem, such spouse shall become the owner of the debtor spouse's interest, subject to any liens thereon at the time of the execution sale.

(2) Upon a redemption by a debtor or the debtor's spouse, the person to whom the payment was made must execute and deliver to him or her a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the county clerk of the county in which the property is situated, and the county clerk must note the record thereof in the margin of the record of the certificate of sale.

History: En. Sec. 232, p. 182, L. 1867; re-en. Sec. 282, p. 88, Cod. Stat. 1871; amd. Sec. 332, p. 129, L. 1877; re-en. Sec. 332, 1st Div. Rev. Stat. 1879; re-en. Sec. 343, 1st Div. Comp. Stat. 1887; amd. Sec. 1236, C. Civ. Proc. 1895; re-en. Sec. 6839, Rev. C. 1907; en. Sec. 2, Ch. 107, L. 1913; re-en. Sec. 9444, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 703; amd. Sec. 2, Ch. 16, L. 1927; re-en. Sec. 9444, R.C.M. 1935; amd. Sec. 2, Ch. 103, L. 1937; amd. Sec. 56, Ch. 535, L. 1975; R.C.M. 1947, 93-5836(part).

25-13-810. When purchaser entitled to conveyance. If no redemption be made within 1 year after the sale, the purchaser or his assignee is entitled to a conveyance; or if so redeemed, whenever 60 days have elapsed and no other redemption has been made and notice thereof given and the time for redemption has expired, the last redemptioner or his assignee is entitled to a sheriff's deed; but in all cases, the judgment debtor shall have the entire period of 1 year from the date of the sale to redeem the property.

History: En. Sec. 232, p. 182, L. 1867; re-en. Sec. 282, p. 88, Cod. Stat. 1871; amd. Sec. 332, p. 129, L. 1877; re-en. Sec. 332, 1st Div. Rev. Stat. 1879; re-en. Sec. 343, 1st Div. Comp. Stat. 1887; amd. Sec. 1236, C. Civ. Proc. 1895; re-en. Sec. 6839, Rev. C. 1907; en. Sec. 2, Ch. 107, L. 1913; re-en. Sec. 9444, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 703; amd. Sec. 2, Ch. 16, L. 1927; re-en. Sec. 9444, R.C.M. 1935; amd. Sec. 2, Ch. 103, L. 1937; amd. Sec. 56, Ch. 535, L. 1975; R.C.M. 1947, 93-5836(part).

25-13-811. Who to execute conveyance. In all cases when, under the provisions of this chapter, a purchaser of property at execution sale shall be entitled to a conveyance of the same, such conveyance shall be executed to him by the officer who made the sale if he still be in office, but in the case the officer who made such sale is not in office at the time the purchaser may be entitled to such conveyance, then the conveyance shall be executed by his successor in office.

History: En. Sec. 233, p. 182, L. 1867; en. Sec. 283, p. 88, Cod. Stat. 1871; re-en. Sec. 333, p. 129, L. 1877; re-en. Sec. 333, 1st Div. Rev. Stat. 1879; re-en.

Sec. 344, 1st Div. Comp. Stat. 1887; re-en. Sec. 1237, C. Civ. Proc. 1895; re-en. Sec. 6840, Rev. C. 1907; re-en. Sec. 9445, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 704; re-en. Sec. 9445, R.C.M. 1935; R.C.M. 1947, 93-5837(part).

25-13-812 through 25-13-820 reserved.

25-13-821. Possession of lands during redemption period. The purchaser of lands at execution sales is not entitled to the possession thereof as against the execution debtor during the period of redemption allowed by law while said execution debtor personally occupies the land as a home for himself and his family. The intention hereof being to insure to such debtor the possession of his land during the year of redemption.

History: En. Sec. 1, Ch. 230, L. 1921; re-en. Sec. 9449, R.C.M. 1921; amd. Sec. 1, Ch. 150, L. 1933; re-en. Sec. 9449, R.C.M. 1935; R.C.M. 1947, 93-5841(part).

25-13-822. Rents and profits during redemption period, accounting. (1) The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, are entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser or his or their assigns from the property thus sold preceding such redemption, the amount of such rents and profits shall be a credit upon the redemption money to be paid.

(2) If the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor or his assigns a written and verified statement of the amount of such rents and profits thus received, the period for redemption is extended 5 days after such sworn statement is given by such purchaser or his assigns to such redemptioner or debtor. If such purchaser or his assigns shall, for a period of 1 month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action in any court of competent jurisdiction to compel an accounting and disclosure of such rents and profits, and until 15 days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor.

History: En. Sec. 236, p. 183, L. 1867; rep. Sec. 751, p. 187, Cod. Stat. 1871; en. Sec. 1240, C. Civ. Proc. 1895; re-en. Sec. 6843, Rev. C. 1907; re-en. Sec. 9448, R.C.M. 1921; Cal. C. Civ. Proc. 707; re-en. Sec. 9448, R.C.M. 1935; R.C.M. 1947, 93-5840.

25-13-823. Restraint of waste during redemption period. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property at the time of sale or entitled to possession afterward, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used, to use it in the ordinary course of husbandry, to make the necessary repairs of buildings thereon, or to use wood or timber on the property therefor or for the repair of fences or for fuel for his family while he occupies the property.

History: En. Sec. 235, p. 182, L. 1867; re-en. Sec. 285, p. 89, Cod. Stat. 1871; re-en. Sec. 335, p. 131, L. 1877; re-en. Sec. 335, 1st Div. Rev. Stat. 1879; re-en. Sec. 346, 1st Div. Comp. Stat. 1887; re-en. Sec. 1239, C. Civ. Proc. 1895; re-en. Sec. 6842, Rev. C. 1907; re-en. Sec. 9447, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 706; re-en. Sec. 9447, R.C.M. 1935; R.C.M. 1947, 93-5839.

25-13-824. Enjoining injury to property after sale and before conveyance. The court or judge may, by injunction, upon good cause shown, restrain the party in possession from doing any act to the injury of real property after a sale on execution, before a conveyance.

History: En. Sec. 240, p. 93, Bannack Stat.; re-en. Sec. 261, p. 188, L. 1867; re-en. Sec. 310, p. 95, Cod. Stat. 1871; re-en. Sec. 360, p. 139, L. 1877; re-en. Sec. 360, 1st Div. Rev. Stat. 1879; re-en. Sec. 372, 1st Div. Comp. Stat. 1887; re-en. Sec. 1318, C. Civ. Proc. 1895; re-en. Sec. 6878, Rev. C. 1907; re-en. Sec. 9496, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 745; re-en. Sec. 9496, R.C.M. 1935; R.C.M. 1947, 93-6220(part).

25-13-825. Damages for injury to property after sale and before conveyance. When real property has been sold on execution, the purchaser thereof or any person who may have succeeded to his interest may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession after sale and before possession is delivered under the conveyance.

History: En. Sec. 262, p. 188, L. 1867; re-en. Sec. 311, p. 95, L. 1871; re-en. Sec. 361, p. 139, L. 1877; re-en. Sec. 361, 1st Div. Rev. Stat. 1879; re-en. Sec. 373, 1st Div. Comp. Stat. 1887; re-en. Sec. 1319, C. Civ. Proc. 1895; re-en. Sec. 6879, Rev. C. 1907; re-en. Sec. 9497, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 746; re-en. Sec. 9497, R.C.M. 1935; R.C.M. 1947, 93-6221.

CHAPTER 14

PROCEEDINGS IN AID OF EXECUTION

Part 1 — Proceedings to Determine Availability of Property

Section

25-14-101. Debtor to answer concerning his property when execution unsatisfied.
25-14-102. Procedure when debtor withholding property from execution, arrest.
25-14-103. Debtors of judgment debtor and those holding his property to answer.
25-14-104. Procedure when debt to or ownership of judgment debtor denied.
25-14-105. Requiring witnesses to testify.
25-14-106. Immunity of witnesses to criminal proceedings.
25-14-107. Order to apply property to satisfaction of judgment.
25-14-108. Contempt to disobey referee's orders.

Part 2 — Appointment of a Receiver

25-14-201. Appointment of a receiver — notice.
25-14-202. Order appointing receiver to be filed.
25-14-203. Oath and undertaking.
25-14-204. When property vests in receiver.
25-14-205. Relation back of receiver's title.

Part 3 — Discharge of Imprisoned Judgment Debtor

25-14-301. Persons imprisoned to be discharged.
25-14-302. Notice of application for discharge.
25-14-303. Service of notice.
25-14-304. Hearing on application.
25-14-305. Interrogatories directed to prisoner by plaintiff.
25-14-306. Prisoner to take oath.
25-14-307. Order of discharge.
25-14-308. Reapplication for discharge.

25-14-309. Effect of discharge.
25-14-310. Judgment unaffected.
25-14-311. Discharge at instance of plaintiff.
25-14-312. Discharge upon failure of plaintiff to advance money for support of prisoner.

Part 1

Proceedings to Determine Availability of Property

25-14-101. Debtor to answer concerning his property when execution unsatisfied. When an execution against property of the judgment debtor or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or, if he does not reside in this state, to the sheriff of the county where the judgment roll is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from a judge of the court requiring such judgment debtor to appear and answer concerning his property before such judge or a referee appointed by him at a time and place specified in the order; but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides.

History: En. Sec. 215, p. 88, Bannack Stat.; re-en. Sec. 238, p. 184, L. 1867; re-en. Sec. 287, p. 90, Cod. Stat. 1871; re-en. Sec. 338, p. 133, L. 1877; re-en. Sec. 338, 1st Div. Rev. Stat. 1879; re-en. Sec. 350, 1st Div. Comp. Stat. 1887; re-en. Sec. 1260, C. Civ. Proc. 1895; re-en. Sec. 6848, Rev. C. 1907; re-en. Sec. 9454, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 714; re-en. Sec. 9454, R.C.M. 1935; R.C.M. 1947, 93-5901.

25-14-102. Procedure when debtor withholding property from execution, arrest. (1) After the issuing of an execution against property and upon proof, by affidavit of a party or otherwise, to the satisfaction of a judge of the court that any judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such judge may, by an order, require the judgment debtor to appear at a specified time and place before such judge or a referee appointed by him to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are provided upon the return of an execution.

(2) Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor or his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into an undertaking with sufficient surety that he will attend from time to time before the judge or referee, as may be directed during the pendency of proceedings and until the final determination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison.

History: En. Sec. 216, p. 88, Bannack Stat.; en. Sec. 239, p. 184, L. 1867; re-en. Sec. 288, p. 90, Cod. Stat. 1871; re-en. Sec. 339, p. 133, L. 1877; re-en. Sec. 339, 1st Div. Rev. Stat. 1879; re-en. Sec. 351, 1st Div. Comp. Stat. 1887; re-en. Sec. 1261, C. Civ. Proc. 1895; re-en. Sec. 6849, Rev. C. 1907; re-en. Sec. 9455, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 715; re-en. Sec. 9455, R.C.M. 1935; R.C.M. 1947, 93-5902.

25-14-103. Debtors of judgment debtor and those holding his property to answer. After the issuing or return of an execution against property of the judgment debtor or of any one of several debtors in the same judgment, or upon proof, by affidavit or otherwise, to the satisfaction of the judge that any person or corporation has property of such judgment debtor or is indebted to him in an amount exceeding $50, the judge may, by an order, require such person or corporation or any officer or member thereof to appear at a specified time and place before him or a referee appointed by him and answer concerning the same.

History: En. Sec. 218, p. 88, Bannack Stat.; re-en. Sec. 241, p. 184, L. 1867; re-en. Sec. 290, Cod. Stat. 1871; re-en. Sec. 341, p. 134, L. 1877; re-en. Sec. 341, 1st Div. Rev. Stat. 1879; re-en. Sec. 353, 1st Div. Comp. Stat. 1887; re-en. Sec. 1263, C. Civ. Proc. 1895; re-en. Sec. 6851, Rev. C. 1907; re-en. Sec. 9457, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 717; re-en. Sec. 9457, R.C.M. 1935; R.C.M. 1947, 93-5904.

25-14-104. Procedure when debt to or ownership of judgment debtor denied. If it appear that a person or corporation alleged to have property of the judgment debtor or to be indebted to him claims an interest in the property adverse to him or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same or the court in which the action is brought, at any time, upon such terms as may be just.

History: En. Sec. 221, p. 89, Bannack Stat.; re-en. Sec. 244, p. 185, L. 1867; re-en. Sec. 293, Cod. Stat. 1871; re-en. Sec. 344, p. 135, L. 1877; re-en. Sec. 344, 1st Div. Rev. Stat. 1879; re-en. Sec. 356, 1st Div. Comp. Stat. 1887; re-en. Sec. 1266, C. Civ. Proc. 1895; re-en. Sec. 6854, Rev. C. 1907; re-en. Sec. 9460, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 720; re-en. Sec. 9460, R.C.M. 1935; R.C.M. 1947, 93-5907.

25-14-105. Requiring witnesses to testify. Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under parts 1 and 2 of this chapter, in the same manner as upon the trial of an issue.

History: En. Sec. 219, p. 88, Bannack Stat.; re-en. Sec. 242, p. 185, L. 1867; re-en. Sec. 291, Cod. Stat. 1871; re-en. Sec. 342, p. 134, L. 1877; re-en. Sec. 342, 1st Div. Rev. Stat. 1879; re-en. Sec. 354, 1st Div. Comp. Stat. 1887; re-en. Sec. 1264, C. Civ. Proc. 1895; re-en. Sec. 6852, Rev. C. 1907; re-en. Sec. 9458, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 718; re-en. Sec. 9458, R.C.M. 1935; R.C.M. 1947, 93-5905.

25-14-106. Immunity of witnesses to criminal proceedings. A party or witness examined in proceedings authorized by parts 1 and 2 of this chapter is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud or to prove that he has been a party or privy to or knowing of a conveyance, assignment, transfer, or other disposition of property for any purpose or that he or any other person claims to be entitled, as against the judgment creditor or a receiver appointed or to be appointed in the proceedings, to hold property derived from or through the judgment debtor or to be discharged from the payment of a debt which was due to the judgment debtor or to a person in his behalf. But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding.

History: En. Sec. 1268, C. Civ. Proc. 1895; re-en. Sec. 6856, Rev. C. 1907; re-en. Sec. 9462, R.C.M. 1921; re-en. Sec. 9462, R.C.M. 1935; R.C.M. 1947, 93-5909.

25-14-107. Order to apply property to satisfaction of judgment. The judge or referee may order any property of a judgment debtor, not exempt from execution, in the hands of such debtor or any other person or due to the judgment debtor, to be applied toward the satisfaction of the judgment.

History: En. Sec. 220, p. 89, Bannack Stat.; re-en. Sec. 243, p. 185, L. 1867; re-en. Sec. 292, Cod. Stat. 1871; re-en. Sec. 343, p. 135, L. 1877; re-en. Sec. 343, 1st Div. Rev. Stat. 1879; re-en. Sec. 355, 1st Div. Comp. Stat. 1887; re-en Sec. 1265, C. Civ. Proc. 1895; re-en. Sec. 6853, Rev. C. 1907; re-en. Sec. 9459, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 719; re-en. Sec. 9459, R.C.M. 1935; R.C.M. 1947, 93-5906.

25-14-108. Contempt to disobey referee's orders. If any person, party, or witness disobey an order of the referee, properly made in the proceedings before him under parts 1 and 2 of this chapter, he may be punished by the court or judge ordering the reference for a contempt.

History: En. Sec. 222, p. 89, Bannack Stat.; re-en. Sec. 245, p. 185, L. 1867; re-en. Sec. 294, Cod. Stat. 1871; re-en. Sec. 345, p. 135, L. 1877; re-en. Sec. 345, 1st Div. Rev. Stat. 1879; re-en. Sec. 357, 1st Div. Comp. Stat. 1887; re-en. Sec. 1267, C. Civ. Proc. 1895; re-en. Sec. 6855, Rev. C. 1907; re-en. Sec. 9461, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 721; re-en. Sec. 9461, R.C.M. 1935; R.C.M. 1947, 93-5908.

Part 2

Appointment of a Receiver

25-14-201. Appointment of a receiver — notice. At any time after making an order requiring the judgment debtor or any other person to attend and be examined, as prescribed in parts 1 and 2 of this chapter, the judge may make an order appointing a receiver of the property of the judgment debtor. At least 2 days' notice of the application for the order appointing a receiver must be given personally to the judgment debtor unless the judge is satisfied that he cannot, with reasonable diligence, be found within the state, in which case the order must recite that fact and may dispense with notice or direct notice to be given in any manner which the judge thinks proper. But where the order to attend and be examined has been served upon the judgment debtor, a receiver may be appointed upon the return day thereof or at the close of the examination without further notice to him.

History: En. Sec. 1269, C. Civ. Proc. 1895; re-en. Sec. 6857, Rev. C. 1907; re-en. Sec. 9463, R.C.M. 1921; re-en. Sec. 9463, R.C.M. 1935; R.C.M. 1947, 93-5910.

25-14-202. Order appointing receiver to be filed. An order appointing a receiver must be filed in the office of the clerk of the court where the judgment roll is filed, or a transcript of the judgment.

History: En. Sec. 1270, C. Civ. Proc. 1895; re-en. Sec. 6858, Rev. C. 1907; re-en. Sec. 9464, R.C.M. 1921; re-en. Sec. 9464, R.C.M. 1935; R.C.M. 1947, 93-5911(part).

25-14-203. Oath and undertaking. The receiver must take and subscribe the official oath and give an undertaking, if required by the judge.

History: En. Sec. 1270, C. Civ. Proc. 1895; re-en. Sec. 6858, Rev. C. 1907; re-en. Sec. 9464, R.C.M. 1921; re-en. Sec. 9464, R.C.M. 1935; R.C.M. 1947, 93-5911(part).

25-14-204. When property vests in receiver. The property of the judgment debtor is vested in a receiver who has duly qualified from the time of filing the order appointing him, subject to the following exceptions:

(1) Real property is vested in the receiver only from the time when the order is filed with the clerk of the court or a certified copy thereof, as the case may be, is filed with the clerk of the county where it is situated.

(2) Where the judgment debtor, at the time when the order is filed, resides in another county of the state, his personal property is vested in the receiver only from the time when a copy of the order, certified by the clerk in whose office it is filed, is filed with the clerk of the district court of the county where he resides.

History: En. Sec. 1271, C. Civ. Proc. 1895; re-en. Sec. 6859, Rev. C. 1907; re-en. Sec. 9465, R.C.M. 1921; re-en. Sec. 9465, R.C.M. 1935; R.C.M. 1947, 93-5912.

25-14-205. Relation back of receiver's title. (1) Where the receiver's title to personal property has become vested, as prescribed in 25-14-204, it also extends back by relation for the benefit of the judgment creditor in whose behalf the proceedings were instituted, as follows:

(a) Where an order requiring the judgment debtor to attend and be examined has been served before the appointment of a receiver or the judgment debtor has been brought before the judge on arrest, the receiver's title extends back so as to include the personal property of the judgment debtor at the time of the service of the order or his arrest.

(b) Where an order has not been served or no arrest, as specified in subsection (1)(a), but an order has been made requiring a person to attend and be examined concerning property belonging or a debt due to the judgment debtor, the receiver's title extends to the personal property belonging to the judgment debtor which was in the hands or under the control of the person or corporation thus required to attend at the time of the service of the order and to a debt then due him from that person or corporation.

(c) In every other case, where notice of the application for the appointment of the receiver was given to the judgment debtor, the receiver's title extends to the personal property of the judgment debtor at the time when the notice was served, either personally or by complying with the requirements of an order prescribing a substitute for personal service.

(2) Where the case is within two or more of subsections (1)(a) through (1)(c) of this section, the rule most favorable to the judgment creditor must be adopted.

(3) But this section does not affect the title of a purchaser in good faith, without notice, and for a valuable consideration or the payment of a debt in good faith and without notice.

History: En. Sec. 1272, C. Civ. Proc. 1895; re-en. Sec. 6860, Rev. C. 1907; re-en. Sec. 9466, R.C.M. 1921; re-en. Sec. 9466, R.C.M. 1935; R.C.M. 1947, 93-5913.

Part 3

Discharge of Imprisoned Judgment Debtor

25-14-301. Persons imprisoned to be discharged. Any person confined in jail on an execution issued on a judgment rendered in a civil action must be discharged therefrom upon the conditions of this part specified.

History: En. Sec. 107, p. 48, Cod. Stat. 1871; re-en. Sec. 145, p. 74, L. 1877; re-en. Sec. 145, 1st Div. Rev. Stat. 1879; re-en. Sec. 147, 1st Div. Comp. Stat. 1887; re-en. Sec. 2060, C. Civ. Proc. 1895; re-en. Sec. 7257, Rev. C. 1907; re-en.

Sec. 9875, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1143; re-en. Sec. 9875, R.C.M. 1935; R.C.M. 1947, 93-9601.

25-14-302. Notice of application for discharge. Such person must cause a notice in writing to be given to the plaintiff or his agent or attorney that at a certain time and place he will apply to a judge of the district court of the county in which such person may be confined for the purpose of obtaining a discharge from his imprisonment.

History: En. Sec. 108, p. 48, Cod. Stat. 1871; re-en. Sec. 146, p. 74, L. 1877; re-en. Sec. 146, 1st Div. Rev. Stat. 1879; re-en. Sec. 148, 1st Div. Comp. Stat. 1887; re-en. Sec. 2061, C. Civ. Proc. 1895; re-en. Sec. 7258, Rev. C. 1907; re-en. Sec. 9876, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1144; re-en. Sec. 9876, R.C.M. 1935; R.C.M. 1947, 93-9602.

25-14-303. Service of notice. Such notice must be served upon the plaintiff or his agent or attorney 1 day at least before the hearing of the application. If the plaintiff be not a resident of the county and have no agent or attorney in the county, no such notice will be served.

History: En. Sec. 109, p. 48, Cod. Stat. 1871; re-en. Sec. 147, p. 74, L. 1877; re-en. Sec. 147, 1st Div. Rev. Stat. 1879; re-en. Sec. 149, 1st Div. Comp. Stat. 1887; re-en. Sec. 2062, C. Civ. Proc. 1895; re-en. Sec. 7259, Rev. C. 1907; re-en. Sec. 9877, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1145; re-en. Sec. 9877, R.C.M. 1935; R.C.M. 1947, 93-9603.

25-14-304. Hearing on application. At the time and place specified in the notice, such person must be taken before the judge, who must examine him under oath concerning his estate and property and effects, the disposal thereof, and his ability to pay the judgment for which he is committed; and such judge may also hear any other legal or pertinent evidence that may be produced by the debtor or the creditor.

History: En. Sec. 110, p. 48, Cod. Stat. 1871; re-en. Sec. 148, p. 74, L. 1877; re-en. Sec. 148, 1st Div. Rev. Stat. 1879; re-en. Sec. 150, 1st Div. Comp. Stat. 1887; re-en. Sec. 2063, C. Civ. Proc. 1895; re-en. Sec. 7260, Rev. C. 1907; re-en. Sec. 9878, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1146; re-en. Sec. 9878, R.C.M. 1935; R.C.M. 1947, 93-9604.

25-14-305. Interrogatories directed to prisoner by plaintiff. The plaintiff in the action may, upon such examination, propose to the prisoner any such interrogatories pertinent to the inquiry; and they must, if required by him, be proposed and answered in writing, and the answer must be signed and sworn to by the prisoner.

History: En. Sec. 2064, C. Civ. Proc. 1895; re-en. Sec. 7261, Rev. C. 1907; re-en. Sec. 9879, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1147; re-en. Sec. 9879, R.C.M. 1935; R.C.M. 1947, 93-9605.

25-14-306. Prisoner to take oath. If, upon the examination, the judge is satisfied that the prisoner is entitled to his discharge, he must administer to him the following oath: "I, ..., do solemnly swear that I have not any estate, real or personal, to the amount of $50, except such as is by law exempted from being taken in execution; and that I have not any other estate now conveyed or concealed or in any way disposed of with design to secure the same to my use or to hinder, delay, or defraud my creditors; so help me God."

History: En. Sec. 111, p. 48, Cod. Stat. 1871; re-en. Sec. 149, p. 74, L. 1877; re-en. Sec. 149, 1st Div. Rev. Stat. 1879; re-en. Sec. 151, 1st Div. Comp. Stat. 1887; re-en. Sec. 2065, C. Civ. Proc. 1895; re-en. Sec. 7262, Rev. C. 1907; re-en.

Sec. 9880, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1148; re-en. Sec. 9880, R.C.M. 1935; R.C.M. 1947, 93-9606.

25-14-307. Order of discharge. After administering the oath, the judge must issue an order that the prisoner be discharged from custody, and the officer, upon the service of such order, must discharge the prisoner forthwith if he be imprisoned for no other cause.

History: En. Sec. 112, p. 48, Cod. Stat. 1871; re-en. Sec. 150, p. 74, L. 1877; re-en. Sec. 150, 1st Div. Rev. Stat. 1879; re-en. Sec. 152, 1st Div. Comp. Stat. 1887; re-en. Sec. 2066, C. Civ. Proc. 1895; re-en. Sec. 7263, Rev. C. 1907; re-en. Sec. 9881, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1149; re-en. Sec. 9881, R.C.M. 1935; R.C.M. 1947, 93-9607.

25-14-308. Reapplication for discharge. If such judge does not discharge the prisoner, he may apply for his discharge at the end of every succeeding 10 days in the same manner as above provided, and the same proceedings must thereupon be had.

History: En. Sec. 113, p. 48, Cod. Stat. 1871; re-en. Sec. 151, p. 74, L. 1877; re-en. Sec. 151, 1st Div. Rev. Stat. 1879; re-en. Sec. 153, 1st Div. Comp. Stat. 1887; re-en. Sec. 2067, C. Civ. Proc. 1895; re-en. Sec. 7264, Rev. C. 1907; re-en. Sec. 9882, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1150; re-en. Sec. 9882, R.C.M. 1935; R.C.M. 1947, 93-9608.

25-14-309. Effect of discharge. The prisoner, after being so discharged, is forever exempt from arrest or imprisonment for the same debt unless he be convicted of having willfully sworn falsely upon his examination before the judge or in taking the oath before prescribed.

History: En. Sec. 114, p. 48, Cod. Stat. 1871; re-en. Sec. 152, p. 74, L. 1877; re-en. Sec. 152, 1st Div. Rev. Stat. 1879; re-en. Sec. 154, 1st Div. Comp. Stat. 1887; re-en. Sec. 2068, C. Civ. Proc. 1895; re-en. Sec. 7265, Rev. C. 1907; re-en. Sec. 9883, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1151; re-en. Sec. 9883, R.C.M. 1935; R.C.M. 1947, 93-9609.

25-14-310. Judgment unaffected. The judgment against any prisoner who is discharged remains in full force against any estate which may then or at any time afterward belong to him, and the plaintiff may take out a new execution against the goods and estate of the prisoner in like manner as if he had never been committed.

History: En. Sec. 2069, C. Civ. Proc. 1895; re-en. Sec. 7266, Rev. C. 1907; re-en. Sec. 9884, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1152; re-en. Sec. 9884, R.C.M. 1935; R.C.M. 1947, 93-9610.

25-14-311. Discharge at instance of plaintiff. The plaintiff in the action may at any time order the prisoner to be discharged, and he is not thereafter liable to imprisonment for the same cause of action.

History: En. Sec. 115, p. 48, Cod. Stat. 1871; re-en. Sec. 153, p. 74, L. 1877; re-en. Sec. 153, 1st Div. Rev. Stat. 1879; re-en. Sec. 155, 1st Div. Comp. Stat. 1887; re-en. Sec. 2070, C. Civ. Proc. 1895; re-en. Sec. 7267, Rev. C. 1907; re-en. Sec. 9885, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1153; re-en. Sec. 9885, R.C.M. 1935; R.C.M. 1947, 93-9611.

25-14-312. Discharge upon failure of plaintiff to advance money for support of prisoner. Whenever a prisoner is committed to jail on an execution issued on a judgment recovered in a civil action, the creditor or his agent or attorney must advance to the jailer, on such commitment, sufficient money for the support of the prisoner for 1 week and must make the like advance for every successive week of his imprisonment, and in case of failure to do so, the jailer must forthwith discharge such prisoner from custody, and such discharge has the same effect as if made by order of the creditor.

History: En. Sec. 2071, C. Civ. Proc. Sec. 1895; re-en. Sec. 7268, Rev. C. 1907; re-en. Sec. 9886, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1154; re-en. Sec. 9886, R.C.M. 1935; R.C.M. 1947, 93-9612.

CHAPTER 15

LIABILITY OF JOINT DEBTORS

Part 1 — Applying Judgment to Joint Debtor

Section
25-15-101. Summoning joint debtor not originally served.
25-15-102. Content and service of summons.
25-15-103. Affidavit to accompany summons — new complaint unnecessary.
25-15-104. Answer — time for filing, contents.
25-15-105. What constitute the pleadings.
25-15-106. Trial of issues — limit on verdict.

Part 2 — Discharge of Joint Debtor

25-15-201. Discharge of one joint debtor.
25-15-202. Effect of discharge — right of contribution.

Part 1

Applying Judgment to Joint Debtor

25-15-101. Summoning joint debtor not originally served. When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided in Rule 4D(10), M.R.Civ.P., those who were not originally served with the summons and did not appear to the action may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons.

History: En. Sec. 291, p. 104, Bannack Stat.; re-en. Sec. 346, p. 205, L. 1867; re-en. Sec. 420, p. 119, Cod. Stat. 1871; re-en. Sec. 446, p. 161, L. 1877; re-en. Sec. 446, 1st Div. Rev. Stat. 1879; re-en. Sec. 459, 1st Div. Comp. Stat. 1887; re-en. Sec. 1780, C. Civ. Proc. 1895; re-en. Sec. 7129, Rev. C. 1907; re-en. Sec. 9762, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 989; re-en. Sec. 9762, R.C.M. 1935; R.C.M. 1947, 93-8101.

25-15-102. Content and service of summons. The summons, as provided in 25-15-101, must describe the judgment and require the person summoned to show cause why he should not be bound by it and must be served in the same manner and returnable within the same time as the original summons.

History: En. Sec. 292, p. 104, Bannack Stat.; re-en. Sec. 347, p. 205, L. 1867; re-en. Sec. 421, p. 119, Cod. Stat. 1871; re-en. Sec. 447, p. 161, L. 1877; re-en. Sec. 447, 1st Div. Rev. Stat. 1879; re-en. Sec. 460, 1st Div. Comp. Stat. 1887; re-en. Sec. 1781, C. Civ. Proc. 1895; re-en. Sec. 7130, Rev. C. 1907; re-en. Sec.

9763, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 990; re-en. Sec. 9763, R.C.M. 1935; R.C.M. 1947, 93-8102(part).

25-15-103. Affidavit to accompany summons — new complaint unnecessary. The summons must be accompanied by an affidavit of the plaintiff or his agent, representative, or attorney that the judgment or some part thereof remains unsatisfied and must specify the amount due thereon. It is not necessary to file a new complaint.

History: Ap. p. Sec. 293, p. 104, Bannack Stat.; re-en. Sec. 348, p. 205, L. 1867; re-en. Sec. 422, p. 119, Cod. Stat. 1871; re-en. Sec. 448, p. 161, L. 1877; re-en. Sec. 448, 1st Div. Rev. Stat. 1879; re-en. Sec. 461, 1st Div. Comp. Stat. 1887; re-en. Sec. 1782, C. Civ. Proc. 1895; re-en. Sec. 7131, Rev. C. 1907; re-en. Sec. 9764, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 991; re-en. Sec. 9764, R.C.M. 1935; Sec. 93-8103, R.C.M. 1947; Ap. p. Sec. 292, p. 104, Bannack Stat.; re-en. Sec. 347, p. 205, L. 1867; re-en. Sec. 421, p. 119, Cod. Stat. 1871; re-en. Sec. 447, p. 161, L. 1877; re-en. Sec. 447, 1st Div. Rev. Stat. 1879; re-en. Sec. 460, 1st Div. Comp. Stat. 1887; re-en. Sec. 1781, C. Civ. Proc. 1895; re-en. Sec. 7130, Rev. C. 1907; re-en. Sec. 9763, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 990; re-en. Sec. 9763, R.C.M. 1935; Sec. 93-8102, R.C.M. 1947; R.C.M. 1947, 93-8102(part), 93-8103.

25-15-104. Answer — time for filing, contents. Upon such summons, the defendant may answer within the time specified therein, denying the judgment or setting up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, except a discharge from such liability by the statute of limitations.

History: En. Sec. 294, p. 105, Bannack Stat.; re-en. Sec. 349, p. 205, L. 1867; re-en. Sec. 423, p. 119, Cod. Stat. 1871; re-en. Sec. 449, p. 161, L. 1877; re-en. Sec. 449, 1st Div. Rev. Stat. 1879; re-en. Sec. 462, 1st Div. Comp. Stat. 1887; re-en. Sec. 1783, C. Civ. Proc. 1895; re-en. Sec. 7132, Rev. C. 1907; re-en. Sec. 9765, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 992; re-en. Sec. 9765, R.C.M. 1935; R.C.M. 1947, 93-8104.

25-15-105. What constitute the pleadings. If the defendant in his answer deny the judgment or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer constitute such written allegations.

History: En. Sec. 295, p. 105, Bannack Stat.; re-en. Sec. 350, p. 205, L. 1867; re-en. Sec. 424, p. 119, Cod. Stat. 1871; re-en. Sec. 450, p. 161, L. 1877; re-en. Sec. 450, 1st Div. Rev. Stat. 1879; re-en. Sec. 463, 1st Div. Comp. Stat. 1887; re-en. Sec. 1784, C. Civ. Proc. 1895; re-en. Sec. 7133, Rev. C. 1907; re-en. Sec. 9766, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 993; re-en. Sec. 9766, R.C.M. 1935; R.C.M. 1947, 93-8105.

25-15-106. Trial of issues — limit on verdict. The issues formed may be tried as in other cases; but when the defendant denies in his answer any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it must be for not exceeding the amount remaining unsatisfied on such original judgment, with interest thereon.

History: En. Sec. 296, p. 105, Bannack Stat.; re-en. Sec. 351, p. 205, L. 1867; re-en. Sec. 425, p. 119, Cod. Stat. 1871; re-en. Sec. 451, p. 161, L. 1877; re-en. Sec. 451, 1st Div. Rev. Stat. 1879; re-en. Sec. 464, 1st Div. Comp. Stat. 1887; re-en. Sec. 1785, C. Civ. Proc. 1895; re-en. Sec. 7134, Rev. C. 1907; re-en. Sec. 9767, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 994; re-en. Sec. 9767, R.C.M. 1935; R.C.M. 1947, 93-8106.

Part 2

Discharge of Joint Debtor

25-15-201. Discharge of one joint debtor. Any joint debtor, including a partner, may compromise with a creditor, and a discharge to him by such creditor is as effectual as if made to all debtors, but such discharge does not relieve the other joint debtors. Any creditor can release a judgment in his favor against any one or more joint debtors, and such release does not discharge the others.

History: En. Sec. 1786, C. Civ. Proc. 1895; re-en. Sec. 7135, Rev. C. 1907; re-en. Sec. 9768, R.C.M. 1921; re-en. Sec. 9768, R.C.M. 1935; R.C.M. 1947, 93-8107.

25-15-202. Effect of discharge — right of contribution. The discharge of such joint debtor operates as a payment to the creditor equal to the proportionate interest of the debtor discharged, but the discharge of such debtor does not prevent his codebtors from enforcing the right of contribution in case they are compelled to pay the whole of the debt.

History: En. Sec. 1787, C. Civ. Proc. 1895; re-en. Sec. 7136, Rev. C. 1907; re-en. Sec. 9769, R.C.M. 1921; re-en. Sec. 9769, R.C.M. 1935; R.C.M. 1947, 93-8108.

CHAPTERS 16 THROUGH 19

RESERVED

CHAPTER 20

RESERVED

I. Scope of Rules — One Form of Action

Rule
1. Scope of rules.
2. One form of action.

II. Commencement of Action — Service of Process, Pleadings, Motions, and Orders

3. Commencement of action.
4. Persons subject to jurisdiction — process — service.
    - A. Definition of person.
    - B. Jurisdiction of persons.
        - (1) Subject to jurisdiction.
        - (2) Acquisition of jurisdiction.
    - C. Process.
        - (1) Summons — issuance.
        - (2) Summons — form.
    - D. Service.
        - (1) By whom served.
        - (2) Personal service within the state.
        - (3) Personal service outside the state.
        - (4) Other service.
        - (5) Service by publication.

        - (a) When permitted.
        - (b) Effect of service by publication.
        - (c) Filing of pleading and affidavit for service by publication; and order for publication.
        - (d) Number of publications.
        - (e) Mailing summons and complaint.
        - (f) Time when first publication or service outside state must be made.
        - (g) When service by publication or outside state complete.
        - (h) Additional information to be published.
    - (6) Service on secretary of state.
    - (7) Amendment.
    - (8) Proof of service.
    - (9) Contents of affidavit of service.
    - (10) Procedure where only part of defendants are served.
- 5. Service and filing of pleadings and other papers.
    - (a) Service — when required.
    - (b) Service — how made.
    - (c) Service — numerous defendants.
    - (d) Filing.
    - (e) Filing with the court defined.
    - (f) Proof of service.
- 6. Time.
    - (a) Computation.
    - (b) Enlargement.
    - (c) Unaffected by expiration of term.
    - (d) For motions — affidavits.
    - (e) Additional time after service by mail.

III. Pleadings and Motions

- 7. Pleadings allowed — form of motions.
    - (a) Pleadings.
    - (b) Motions and other papers.
    - (c) Demurrers, pleas, etc., abolished.
- 8. General rules of pleading.
    - (a) Claims for relief.
    - (b) Defenses — form of denials.
    - (c) Affirmative defenses.
    - (d) Effect of failure to deny.
    - (e) Pleading to be concise and direct — consistency.
    - (f) Construction of pleadings.
- 9. Pleading special matters.
    - (a) Capacity.
    - (b) Fraud, mistake, condition of the mind.
    - (c) Conditions precedent.
    - (d) Official document, act, ordinance or statute.
    - (e) Judgment.
    - (f) Time and place.
    - (g) Special damage.
- 10. Form of pleading.
    - (a) Caption — names of parties.
    - (b) Paragraphs — separate statements.
    - (c) Adoption by reference — exhibits.
- 11. Signing of pleadings.
- 12. Defenses and objections — when and how presented — by pleading or motion — for judgment on pleadings.
    - (a) When presented.
    - (b) How presented.
    - (c) Motion for judgment on the pleadings.
    - (d) Preliminary hearings.
    - (e) Motion for more definite statement.
    - (f) Motion to strike.

  - (g) Consolidation of defenses in motion.
  - (h) Waiver of preservation of certain defenses.
- 13. Counterclaim and cross-claim.
  - (a) Compulsory counterclaims.
  - (b) Permissive counterclaims.
  - (c) Counterclaim exceeding opposing claim.
  - (d) Counterclaim against the state.
  - (e) Counterclaim maturing or acquired after pleading.
  - (f) Omitted counterclaim.
  - (g) Cross-claim against coparty.
  - (h) Joinder of additional parties.
  - (i) Separate trials — separate judgments.
- 14. Third-party practice.
  - (a) When defendant may bring in the third party.
  - (b) When plaintiff may bring in third party.
- 15. Amended and supplemental pleadings.
  - (a) Amendments.
  - (b) Amendments to conform to the evidence.
  - (c) Relation back of amendments.
  - (d) Supplemental pleadings.
- 16. Pretrial procedure — formulating issues.

IV. Parties

- 17. Parties plaintiff and defendant — capacity.
  - (a) Real party in interest.
  - (b) Capacity to sue or be sued.
  - (c) Infants or incompetent persons.
- 18. Joinder of claims and remedies.
  - (a) Joinder of claims.
  - (b) Joinder of remedies — fraudulent conveyances.
- 19. Joinder of persons needed for just adjudication.
  - (a) Persons to be joined if feasible.
  - (b) Determination by court of whenever joinder not feasible.
  - (c) Pleading reasons for nonjoinder.
  - (d) Exception of class actions.
- 20. Permissive joinder of parties.
  - (a) Permissive joinder.
  - (b) Separate trials.
- 21. Misjoinder and nonjoinder of parties.
- 22. Interpleader.
  - (a) By joinder, cross-claim or counterclaim.
  - (b) By substitution.
- 23. Class actions.
  - (a) Prerequisites to a class action.
  - (b) Class actions maintainable.
  - (c) Determination by order whether class action to be maintained — notice — judgment — actions conducted partially as class actions.
  - (d) Order in conduct of actions.
  - (e) Dismissal or compromise.
  - (f) Security for costs.
- 23.1 Derivative actions by shareholders.
- 23.2 Actions relating to unincorporated associations.
- 24. Intervention.
  - (a) Intervention of right.
  - (b) Permissive intervention.
  - (c) Procedure.
- 25. Substitution of parties.
  - (a) Death.
  - (b) Incompetency.
  - (c) Transfer of interest.
  - (d) Substitution of successor to public officer.

V. Depositions and Discovery

26. General provisions governing discovery.
    (a) Discovery methods.
    (b) Scope of discovery.
    (c) Protective orders.
    (d) Sequence and timing of discovery.
    (e) Supplementation of response.
27. Depositions before action or pending appeal.
    (a) Before action.
    (b) Pending appeal.
    (c) Perpetuation by petition.
28. Persons before whom depositions may be taken.
    (a) Within the United States.
    (b) In foreign countries.
    (c) Disqualification for interest.
    (d) Depositions to be used in other states.
    (e) Deposition to be taken in sister states and foreign countries for use in this state.
29. Stipulations regarding discovery procedure.
30. Depositions upon oral examination.
    (a) When depositions may be taken.
    (b) Notice of examination; general requirements — special notice — nonstenographic recording — production of documents and things — deposition of organization.
    (c) Examination and cross-examination — record of examination — oath — objections.
    (d) Motion to terminate or limit examination.
    (e) Submission to witness — changes — signing.
    (f) Certification and filing by officer — exhibits — copies — notice of filing.
    (g) Failure to attend or to serve subpoena — expenses.
31. Depositions upon written questions.
    (a) Serving questions — notice.
    (b) Officer to take responses and prepare record.
    (c) Notice of filing.
32. Use of depositions in court proceedings.
    (a) Use of depositions.
    (b) Objections to admissibility.
    (c) Effect of taking or using depositions.
    (d) Effect of errors and irregularities in depositions.
33. Interrogatories to parties.
    (a) Availability — procedures for use.
    (b) Scope — use at trial.
    (c) Option to produce business records.
34. Production of documents and things and entry upon land for inspection and other purposes.
    (a) Scope.
    (b) Procedure.
    (c) Persons not parties.
35. Physical and mental examination of persons.
    (a) Order for examination.
    (b) Report of examining physician.
36. Requests for admissions.
    (a) Request for admission.
    (b) Effect of admission.
37. Failure to make discovery: sanctions.
    (a) Motion for order compelling discovery.
    (b) Failure to comply with order.
    (c) Expenses on failure to admit.
    (d) Failure of party to attend at own deposition or serve answers in interrogatories or respond to request for inspection.

VI. Trials

38. Jury trial of right.

- (a) Right reserved.
- (b) Demand.
- (c) [Demand] — specification of issues.
- (d) Waiver.

39. Trial by jury or by the court.
    - (a) By jury.
    - (b) By the court.
    - (c) Advisory jury and trial by consent.
40. Assignment of cases for trial.
41. Dismissal of actions.
    - (a) Voluntary dismissal — effect thereof.
        - (1) By plaintiff — by stipulation.
        - (2) By order of court.
    - (b) Involuntary dismissal — effect thereof.
    - (c) Dismissal of counterclaim, cross-claim, or third-party claim.
    - (d) Costs of previously-dismissed action.
    - (e) Failure to serve summons.
42. Consolidation — separate trials.
    - (a) Consolidation.
    - (b) Separate trials.
43. Evidence.
    - (b) Scope of examination and cross-examination.
    - (c) Record of excluded evidence.
    - (d) Affirmation in lieu of oath.
    - (e) Evidence on motions.
    - (f) Interpreters.
44. Proof of official record.
    - (a) Authentication.
    - (b) Lack of record.
    - (c) Other proof.

44.1 Determination of foreign law.

45. Subpoena.
    - (a) For attendance of witnesses — form — issuance.
    - (b) For production of documentary evidence.
    - (c) Service.
    - (d) Subpoena for taking depositions — place of examinations.
    - (e) Subpoena for hearing or trial.
    - (f) Contempt.
46. Exceptions unnecessary.
47. Jurors.
    - (a) Examination of jurors.
    - (b) Manner of selection and order of examination of jurors.
    - (c) Alternate jurors.
48. Juries — verdict.
49. Special verdicts and interrogatories.
    - (a) Special verdicts.
    - (b) General verdict accompanied by answer to interrogatories.
50. Motion for a directed verdict and for judgment notwithstanding the verdict.
    - (a) Motion for directed verdict — when made, effect.
    - (b) Motion for judgment notwithstanding the verdict.
    - (c) Motion for judgment notwithstanding the verdict — conditional rulings on grant of motion.
    - (d) Motion for judgment notwithstanding the verdict — denial of motion.
51. Instructions to jury — objection.
52. Findings by the court.
    - (a) Effect.
    - (b) Amendment.
53. Masters.
    - (a) Appointment and compensation.
    - (b) Reference.
    - (c) Powers.
    - (d) Proceedings.

(1) Meetings.
(2) Witnesses.
(3) Statement of accounts.
(e) Report.

VII. Judgment

54. Judgments — costs.
  (a) Definition — form.
  (b) Judgment upon multiple claims or involving multiple parties.
  (c) Demand for judgment.
  (d) Costs.
55. Default.
  (a) Entry.
  (b) Judgment.
  (c) Default — setting aside — extension of time by court or stipulation of parties.
  (d) Plaintiffs, counterclaims, cross-claimants.
56. Summary judgment.
  (a) For claimant.
  (b) For defending party.
  (c) Motion and proceedings thereon.
  (d) Case not fully adjudicated on motion.
  (e) Form of affidavits — further testimony — defense required.
  (f) When affidavits are unavailable.
  (g) Affidavits made in bad faith.
57. Declaratory judgments.
58. Entry of judgment.
59. New trials — amendment of judgment.
  (a) Grounds.
  (b) Time for motion.
  (c) Time for serving affidavits.
  (d) Time for hearing on motion.
  (e) On initiative of court.
  (f) Order granting a new trial.
  (g) Motion to alter or amend a judgment.
60. Relief from judgment or order.
  (a) Clerical mistakes.
  (b) Mistakes — inadvertence — excusable neglect — newly discovered evidence — fraud, etc.
  (c) Time for hearing and determining motions.
61. Harmless error.
62. Stay of proceedings to enforce a judgment.
  (a) Superseded — M.R.App.Civ.P., Rule 7.
  (b) Stay on motion for new trial or for judgment.
  (c) Injunction pending appeal.
  (d) Superseded — M.R.App.Civ.P., Rule 7.
  (e) Stay in favor of the state of Montana or agency thereof.
  (g) Power of appellate court not limited.
  (h) Stay of judgment upon multiple claims.

VIII. Provisional and Final Remedies and Special Proceedings

64. Seizure of person or property.
65. Injunctions.
66. Receivers.
67. Deposit in court.
68. Offer of judgment.
69. Execution.
70. Judgment for specific acts — vesting title.
71. Process in behalf of and against persons not parties.

IX. Appeals

72. Appeal from a district court to the supreme court.

X. District Courts and Clerks

77. District courts and clerks.
    (a) District courts always open.
    (b) Trials and hearings — orders in chambers.
    (c) Clerks's office and orders by clerk.
    (d) Notice of orders or judgments.
    (e) Transmittal of file on removal.
80. Stenographer — stenographic report or transcript as evidence.

XI. General Provisions

81. Applicability in general.
    (a) Special statutory proceedings.
    (b) Appeals to district courts.
    (c) Rules incorporated into statutes.
82. Jurisdiction and venue unaffected.
83. Rules by district courts.
84. Forms.
85. Title.
86. Effective date — statutes superseded.
    (a) Effective date and application to pending proceedings.
    (b) Statutes superseded.

Appendix of forms

Form
1. Summons — official form in the district court of the .... judicial district of the state of Montana, in and for the county of .....
2. Complaint on a promissory note.
3. Complaint on an account.
4. Complaint for goods sold and delivered.
5. Complaint for money lent.
6. Complaint for money paid by mistake.
7. Complaint for money had and received.
8. Complaint for negligence.
9. Complaint for negligence where plaintiff is unable to determine definitely whether the person responsible is c. d. or e. f. or whether both are responsible and where his evidence may justify a finding of willfulness or of recklessness or of negligence.
10. Complaint for conversion.
11. Complaint for specific performance of contract to convey land.
12. Complaint on claim for debt and to set aside fraudulent conveyance under rule 18(b).
13. Complaint for negligence under federal employees' liability act (45 U.S.C.A., §§51-58).
14. Complaint for interpleader and declaratory relief.
15. Motion to dismiss.
16. Answer presenting defenses under rule 12(b).
17. Answer to complaint set forth in form 7, with counterclaim for interpleader.
18. Summons and third-party complaint — interpleader.
19. Motion to intervene as a defendant under rule 24.
20. Motion for production, etc., under rule 34.
21. Request for admission under rule 36.
22. Allegation of reason for omitting necessary party.
23. Supersedeas bond.

I. Scope of Rules — One Form of Action

Rule 1. Scope of rules. These rules govern the procedure in the district courts of the state of Montana in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81; provided, however, that the discovery procedures set forth in Rules 26 through 37, inclusive, shall be applicable to proceedings in probate. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

History: En. Sec. 1, Ch. 13, L. 1961.

Rule 2. One form of action. There shall be one form of action to be known as "Civil Action."

History: En. Sec. 2, Ch. 13, L. 1961.

II. Commencement of Action — Service of Process, Pleadings, Motions, and Orders

Rule 3. Commencement of action. A civil action is commenced by filing a complaint with the court.

History: En. Sec. 3, Ch. 13, L. 1961.

Rule 4. Persons subject to jurisdiction — process — service

Rule 4A. Definition of person. As used in this rule, the word "person," whether or not a citizen or resident of this state and whether or not organized under the laws of this state, includes an individual whether operating in his own name or under a trade name; an individual's agent or personal representative; a corporation; a business trust; an estate; a trust; a partnership; an unincorporated association; and any two or more persons having a joint or common interest or any other legal or commercial entity.

History: En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

Rule 4B. Jurisdiction of persons. (1) Subject to jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts:

(a) the transaction of any business within this state;

(b) the commission of any act which results in accrual within this state of a tort action;

(c) the ownership, use or possession of any property, or of any interest therein, situated within this state;

(d) contracting to insure any person, property or risk located within this state at the time of contracting;

(e) entering into a contract for services to be rendered or for materials to be furnished in this state by such person; or

(f) acting as director, manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within this state, or as executor or administrator of any estate within this state.

(2) Acquisition of jurisdiction. Jurisdiction may be acquired by our courts over any person through service of process as herein provided; or by the voluntary appearance in an action by any person either personally, or through an attorney, or through any other authorized officer, agent or employee.

History: En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

Rule 4C. Process. (1) Summons — issuance. Upon the filing of the complaint, the clerk shall forthwith issue a summons, and shall deliver the summons either to the sheriff of the county in which the action is filed, or to the person who is to serve it, or upon request, to the attorney for said party who shall thereafter be responsible to see that the summons is served in the manner prescribed by these rules. Upon request, separate or additional summons shall issue against any parties designated in the original action, or against any additional parties who may be brought into the action.

(2) Summons — form. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. In an action brought to quiet title to real estate, there shall be added to the foregoing, the following: "This action is brought for the purpose of quieting title to land situated in ... County, Montana, and described as follows: (Here insert descriptions of land.)." For exceptions to this form of summons see 4D(4) "Other service," set forth hereinafter.

History: En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 4D. Service. (1) By whom served. Service of all process shall be made by a sheriff of the county where the party to be served is found, by his deputy, by a constable authorized by law, or by any other person over the age of 18 not a party to the action, except that a subpoena may be served as provided in Rule 45.

(2) Personal service within the state. The summons and complaint shall be served together, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(a) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given.

(b) Upon a minor over the age of 14 years, by delivering a copy of the summons and complaint to him personally, and by leaving a copy thereof at his dwelling house or usual place of abode with some adult of suitable discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

(c) Upon a minor under the age of 14 years, by delivering a copy of the summons and complaint to his guardian, if he has one within the state, and if not, then to his father or mother or other person or agency having his care or control, or with whom he resides, or if service cannot be made upon any of them, then as provided by order of the court.

(d) Upon a person who has been adjudged of unsound mind by a court of this state, or for whom a guardian has been appointed in this state by reason of incompetency, by delivering a copy of the summons and complaint to his guardian, if there be a guardian residing in this state appointed and acting under the laws of this state. If there be no such guardian, the court shall appoint a guardian ad litem for the incompetent person, with or without personal service on the incompetent, as the court may direct. When a party is alleged to be of unsound mind, but has not been so adjudged by a court of this state, such party may be brought into court by service of process personally upon him. The court may also stay any action pending against a person on learning that such person is of unsound mind.

(e) Upon a domestic corporation, partnership or other unincorporated association, or upon a foreign corporation, partnership or other unincorporated association, established by the laws of any other state or country, and having a place of business within this state or doing business herein either permanently or temporarily, or which was doing business herein either permanently, or temporarily at the time the claim for relief accrued: (i) by delivering a copy of the summons and complaint to an officer, director, superintendent or managing or general agent, or partner, or associate for such corporation, partnership, or association; or by leaving such copies at the office or place of business of the corporation, partnership, or association within the state with the person in charge of such office; or (ii) by delivering a copy of the summons and complaint to the registered agent of said corporation named on the records of the secretary of state, or to any other agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the corporation, partnership, or association, provided that if the agent or attorney in fact is one designated by statute to receive service, such further notice as the statute requires shall also be given; or (iii) if the sheriff shall make return that no person upon whom service may be made can be found in the county, then service may be made by leaving a copy of the summons and complaint at any office of the corporation, partnership, or unincorporated association within this state with the person in charge of such office; or (iv) if the suit is against a corporation whose charter or right to do business in the state has expired or been forfeited, by delivering a copy thereof to any one of the persons who have become trustees for the corporation and its stockholders or members.

(f) When a claim for relief is pending in any court of this state against a corporation organized under the laws of this state, or against a corporation organized under the laws of any other state or country, that has filed a copy of its charter in the office of the secretary of state of Montana and qualified to do business in Montana; or against a corporation organized under the laws of any other state or country which is subject to the jurisdiction of the courts of this state under the provisions of Rule 4B above, even though such corporation has never qualified to do business in Montana; or against a national banking corporation which, through insolvency or lapse of charter, has ceased to do business in Montana; and none of the persons designated in D(2)(e) immediately above can with the exercise of reasonable diligence be found within Montana, the party causing summons to be issued shall exercise reasonable diligence to ascertain the last known address of any such person. Upon the filing with the clerk of court in which the claim for relief is pending of an affidavit reciting that none of the persons designated in D(2)(e) can after due diligence be found within Montana upon whom service of process can be made, and reciting the last known address of any such person, or reciting that after the exercise of reasonable diligence no such address for any such person could be found, and there has also been deposited with the said clerk the sum of $5 to be paid to the secretary of state as a fee for each of said defendants for whom the secretary of state is to receive said service, then the clerk of court shall issue an order directing process to be served upon the secretary of state of the state of Montana or, in his absence from his office, upon the deputy secretary of state of the state of Montana. Such affidavit shall be sufficient evidence of the diligence of inquiry made by affiant, if the affidavit recites that diligent inquiry was made, and the affidavit need not detail the facts constituting such inquiry. Whenever service is also to be made through publication as provided in 4D(5), or upon other persons as provided in 4D(6), the affidavit herein required may be combined in the same instrument with the affidavit required under 4D(5)(c) and 4D(6). The said clerk of court shall then mail to the secretary of state the original summons, one copy of the summons and one copy of the affidavit for the files of the secretary of state, one copy of the summons attached to a copy of the complaint for each of the defendants to be served by service upon the secretary of state, and the fee for service, to the office of the secretary of state. The secretary of state shall mail copy of the summons and complaint by certified or registered mail with a return receipt requested to the last known address of any of the persons designated in D(2)(e) above, if known, or, if none such is known and it is a corporation not organized in Montana, to the secretary of state of the state in which such corporation was originally incorporated, if known; and the secretary of state shall make his return as hereinafter provided under Rule 4D(6). When service is so made, it shall be deemed personal service on such corporation, and the said secretary of state, or his deputy when the secretary is absent from his office, is hereby appointed agent of such corporation for service of process in cases hereinbefore mentioned. In any action where due diligence has been exercised to locate and serve any of the persons designated in D(2)(e) above, service shall be deemed complete upon said corporation regardless of the receipt of any return receipt or advice of refusal of the addressee to receive the process mailed, as is hereinafter required by 4D(6); provided, however, that except in those actions where any of the persons designated in D(2)(e) above have been located and served personally as herinabove provided, then service by publication shall also be made as provided hereafter in 4D(5)(d) and 4D(5)(h); the first publication must be made within 60 days from the date the original summons is mailed to the secretary of state as herein provided, and if said first publication is not so made, the action shall be deemed dismissed as to any such party intended to be served by such publication; and service shall be complete upon the date of the last publication of summons.

When service of process is made as herein provided, and there is no appearance thereafter made by any attorney for such corporation, service of all other notices required by law to be served in such action may be served upon the secretary of state.

(g) Upon a city, village, town, school district, county, or public agency or board of any such public bodies, by delivering a copy of the summons and complaint to any commissioner, trustee, board member, mayor or head of the legislative department thereof.

(h) Upon the state, or any state board or state agency, by delivering a copy of the summons and complaint to the governor, or to any member of such state board or state agency, and also by delivering an additional copy of the summons and complaint to the attorney general.

(i) Upon an estate by delivering a copy of the summons and complaint to the personal representative thereof; upon a trust by delivering a copy of the summons and complaint to any trustee thereof.

(3) Personal service outside the state. Where service upon any person cannot, with due diligence, be made personally within this state, service of summons and complaint may be made by service outside this state in the manner provided for service within this state, with the same force and effect as though service had been made within this state. Where service by publication is permitted as hereinafter provided, personal service of a summons and complaint upon the defendant out of the state shall be equivalent to and shall dispense with the procedures and the publication and mailing provided for hereafter in 4(5)(c), 4(5)(d) and 4(5)(e) of this rule.

(4) Other service. All process in any form of action shall be served in the manner specified in this rule with the exception that whenever a statute of this state or an order of the court or a citation by the court made pursuant thereto provides for the service of a notice or of an order or of a citation in lieu of summons upon any person, service shall be made under the circumstances and in the manner prescribed by the statute or order or citation; and with the further exception that all persons are required to comply with the provisions hereafter prescribed in D(5)(h),

and with the provisions of 33-1-603, 33-1-613, 33-1-614, 33-2-314, 33-2-315, 70-28-207, 70-28-208, 70-28-209, and 70-28-212, Montana Code Annotated, when the action pertains to the provisions of such sections.

(5) Service by publication — when permitted — effect — manner — proof.

(a) When permitted. A defendant, whether known or unknown, who has not been served under the foregoing subsections of this rule can be served by publication in the following situations only:

(i) When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest therein. This subsection shall apply whether any such defendant is known or unknown.

(ii) When the action is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real or personal property within this state.

(iii) When the action is for divorce or for annulment of marriage of a resident of this state or for modification of a decree of divorce granted by a court of this state.

(iv) When the defendant has property within this state which has been attached or has a debtor within this state, who has been garnished. Jurisdiction under this subsection may be independent of or supplementary to jurisdiction acquired under subsections (5)(a)(i), (5)(a)(ii), and (5)(a)(iii) herein.

(b) Effect of service by publication. When a defendant, whether known or unknown, has been served by publication as provided in this rule, any court of this state having jurisdiction may render a decree which will adjudicate any interest of such defendant in the status, property, or thing acted upon, but it may not bind the defendant personally to the personal jurisdiction of the court unless some ground for the exercise of personal jurisdiction exists.

(c) Filing of pleading and affidavit for service by publication; and order for publication. Before service of the summons by publication is authorized in any case, there shall be filed with the clerk in the district court of the county in which the action is commenced (i) a pleading setting forth a claim in favor of the plaintiff and against the defendant in one of the situations defined in (5)(a) above; and (ii) in situations defined in (5)(a)(i), (5)(a)(ii), (5)(a)(iii), upon return of the summons showing the failure to find any defendant designated in the complaint, an affidavit stating that such defendant resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons; or, if the defendant is a domestic or foreign corporation, that none of the persons designated in D(2)(e) above can, after due diligence, be found within the state; or, if the defendant is an unknown claimant, by showing that he has made diligent search and inquiry for all persons who claim, or might claim any right, title, estate, or interest in, or lien, or encumbrance upon, such property, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any right of dower, inchoate or accrued, and that he has specifically named as defendants in such action all such persons whose names can be ascertained; such affidavit shall be sufficient evidence of the diligence of any inquiry made by the affiant, if the affidavit recite the fact that diligent inquiry was made, and it need not detail the facts constituting such inquiry, and if desired, it may be combined in one instrument with the affidavit required under 4D(2)(f), or 4D(6); and (iii) in the situation defined in (5)(a)(iv) above, there must be first presented to the court proof that a valid attachment or garnishment has been effected. Upon complying herewith, the plaintiff may obtain an order for the service of summons to be made upon the defendants by publication, which order may be issued by either the judge or the clerk of the court.

(d) Number of publications. Service of the summons by publication may be made by publishing the same three times, once each week for 3 successive weeks, in a newspaper published in the county in which the action is pending, if a newspaper is published in such county, and if no newspaper is published in such county then in a newspaper published in an adjoining county and having a general circulation therein.

(e) Mailing summons and complaint. A copy of the summons for publication and complaint, at any time after the filing of the affidavit for publication and not later than 10 days after the first publication of the summons, shall be deposited in some post office in this state, postage prepaid, and directed to the defendant at his place of residence unless the affidavit for publication states that the residence of the defendant is unknown. If the defendant is a corporation, and personal service cannot with due diligence be effected within Montana on any of the persons designated in D(2)(e) above, then service may be completed on said corporation by service upon the secretary of state in the manner, and following the procedure outlined in D(2)(f) above.

(f) Time when first publication or service outside state must be made. The first publication of summons, or personal service of the summons and complaint upon the defendant out of the state, must be made within 60 days after the filing of the affidavit for publication. If not so made, the action shall be deemed dismissed as to any party intended to be served by such publication.

(g) When service by publication or outside state complete. Service by publication is complete on the date of the last publication of the summons, or in case of personal service of the summons and complaint upon the defendant out of the state, on the date of such service.

(h) Additional information to be published. In addition to the form of summons prescribed above in "C. Process, (2) Summons—form," the published summons shall state in general terms the nature of the action, and in all cases where publication of summons is made in an action in which the title to, or any interest in or lien upon real property is involved, or affected, or brought into question, the publication shall also contain a description of the real property involved, affected or brought into question thereby, and a statement of the object of the action.

(6) (a) Service on secretary of state. Whenever service is to be made upon certain corporations as provided hereinabove in D(2)(f) and D(5)(e), the requirements of said D(2)(f) must be complied with. In all other cases, unless otherwise provided by statute, whenever the secretary of state of the state of Montana has been appointed, or is deemed by law to have been appointed, as the agent to receive service of process for any person who cannot with due diligence be found or served personally within Montana, the party, or his attorney, shall make an affidavit stating the facts showing that the secretary of state is such agent, and stating the residence and last known post-office address of the person to be served, and shall file such affidavit with the clerk of court in which such claim for relief is pending, accompanied by sufficient copies of the affidavit, summons and complaint for service upon the secretary of state, and there has also been deposited with the clerk of the court in which such claim for relief is pending the sum of $5 to be paid to the secretary of state as a fee for each of said defendants for whom the secretary of state is to receive such service; then the clerk shall forward the original summons, one copy of the summons and one copy of the affidavit for the files of the secretary of state, and one copy of the summons attached to copy of the complaint for each of the defendants to be served by service upon the secretary of state, and the fee, to the office of the secretary of state.

Such service on the secretary of state shall be sufficient personal service upon the person to be served, provided that notice of such service and a copy of the summons and complaint are forthwith sent by registered or certified mail by the secretary of state or his deputy to the party to be served at his last known address, marked "Deliver to Addressee Only" and "Return Receipt Requested," and provided further that such return receipt shall be received by the secretary of state purporting to have been signed by said addressee, or the secretary of state shall be advised by the postal authority that delivery of said registered or certified mail was refused by said addressee, except in those cases where compliance is excused under the provisions of D(2)(f) above. The date upon which the secretary of state receives said return receipt, or receives advice by the postal authority that delivery of said registered or certified mail was refused by the addressee, shall be deemed the date of service.

As an alternative to sending the summons and complaint by registered or certified mail, as herein provided, the secretary of state, or his deputy, may cause copy of the summons and complaint to be served by any qualified law enforcement officer, in accord with the procedure set out in D(1), (2) or (3) of this rule.

The secretary of state, or his deputy, shall make an original and two copies of an affidavit reciting: (1) the fact of service upon him by the clerk of court, including the day, and hour of such service; (2) the fact of his mailing a copy of the summons and complaint and notice to the defendant, including the day and hour thereof, except in those cases where he is relieved from doing so under the provisions of D(2)(f) in which cases his affidavit shall so recite; and (3) the fact of his receipt of a return from the postal department including the date, and hour thereof, and attaching to his affidavit a copy of such return. The secretary of state, or his deputy, shall then transmit the original summons, and his original affidavit along with copy of his notice to the defendant where such notice was required, to the clerk of court in which the claim for relief is pending, and it shall be filed in the claim for relief by said clerk of court; and the secretary of state shall also transmit to the attorney for the plaintiff copy of the affidavit of the secretary of state along with copy of the notice to the defendant where such notice was required. The secretary of state shall keep on file in his office a copy of the summons, a copy of the affidavit served on him by the clerk of court, and a copy of the affidavit executed and issued by the secretary of state.

(b) Continuance to allow defense. In any of the cases provided for in Rule 4D(2)(f) above, or provided for hereinabove in 4D(6)(a), the court in which the claim for relief is pending may order such continuance as may be necessary to afford reasonable opportunity to defend the action.

(7) Amendment. At any time, in its discretion, and upon such notice and terms as it deems just, the court may allow any process or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(8) Proof of service. Proof of the service of the summons and of the complaint or notice, if any, accompanying the same must be as follows:

(a) If served by the sheriff or other officer, his certificate thereof;

(b) If by any other person, his affidavit thereof;

(c) In case of publication an affidavit of the publisher and an affidavit of the deposit of a copy of the summons and complaint in the post office as required by law, if the same shall have been deposited; or

(d) The written admission of the defendant showing the date and place of service.

The certificate or affidavit of service mentioned in this subdivision must state the time, date, place, and manner of service.

(9) Contents of affidavit of service. Whenever a process, pleading, order of court, or other paper is served personally by a person other than the sheriff or person designated by law, the affidavit of service when made, shall state that the person so serving is of legal age, and the date and place of making the service. It also shall state that the person making such service knew the person served to be the person named in the papers served and the person intended to be served.

(10) Procedure where only part of defendants are served. If the summons is served on one or more, but not all, of the defendants, the plaintiff may proceed to trial and judgment against the defendant or defendants on whom the process is served, and may at any time thereafter have a summons against the defendant not

served with the first process to cause him to appear in said court to show cause why he should not be made a party to such judgment. Upon such defendant being duly served with such process, the court shall hear and determine the matter in the same manner as if such defendant had been originally brought into court, and such defendant shall also be allowed the benefit of any payment or satisfaction which may have been made on the judgment before recovered.

History: En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750, Nov. 28, 1966, eff. Jan. 1, 1967; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 5. Service and filing of pleadings and other papers

Rule 5(a). Service — when required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

History: En. Sec. 5, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 5(b). Service — how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

History: En. Sec. 5, Ch. 13, L. 1961.

Rule 5(c). Service — numerous defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

History: En. Sec. 5, Ch. 13, L. 1961.

Rule 5(d). Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

History: En. Sec. 5, Ch. 13, L. 1961.

Rule 5(e). Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

History: En. Sec. 5, Ch. 13, L. 1961.

Rule 5(f). Proof of service. Proof of service shall be made by an affidavit of the party or his attorney making service, or by the certificate of his resident attorney making service or by an acknowledgment in writing from the party or attorney served, and such affidavit, certificate or acknowledgment shall be filed within 10 days after service. Failure to make proof of service does not affect the validity of the service.

History: En. Sec. 5, Ch. 13, L. 1961.

Rule 6. Time

Rule 6(a). Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

History: En. Sec. 6, Ch. 13, L. 1961.

Rule 6(b). Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d), (e) and (f), and 60(b), except to the extent and under the conditions stated in them.

History: En. Sec. 6, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Rule 6(c). Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

History: En. Sec. 6, Ch. 13, L. 1961.

Rule 6(d). For motions — affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

History: En. Sec. 6, Ch. 13, L. 1961.

Rule 6(e). Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

History: En. Sec. 6, Ch. 13, L. 1961.

III. Pleadings and Motions

Rule 7. Pleadings allowed — form of motions

Rule 7(a). Pleadings. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; and an answer to a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

History: En. Sec. 7, Ch. 13, L. 1961.

Rule 7(b). Motions and other papers. (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

History: En. Sec. 7, Ch. 13, L. 1961.

Rule 7(c). Demurrers, pleas, etc., abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

History: En. Sec. 7, Ch. 13, L. 1961.

Rule 8. General rules of pleading

Rule 8(a). Claims for relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

History: En. Sec. 8, Ch. 13, L. 1961.

Rule 8(b). Defenses — form of denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

History: En. Sec. 8, Ch. 13, L. 1961; amd. Sup. Ct. Ord. June 1, 1964, eff. July 1, 1964.

Rule 8(c). Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

History: En. Sec. 8, Ch. 13, L. 1961; amd. Sup. Ct. Ord. June 1, 1964, eff. July 1, 1964.

Rule 8(d). Effect of failure to deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

History: En. Sec. 8, Ch. 13, L. 1961.

Rule 8(e). Pleading to be concise and direct — consistency. (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motion are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

History: En. Sec. 8, Ch. 13, L. 1961.

Rule 8(f). Construction of pleadings. All pleadings shall be so construed as to do substantial justice.

History: En. Sec. 8, Ch. 13, L. 1961.

Rule 9. Pleading special matters

Rule 9(a). Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

History: En. Sec. 9, Ch. 13, L. 1961.

Rule 9(b). Fraud, mistake, condition of the mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

History: En. Sec. 9, Ch. 13, L. 1961.

Rule 9(c). Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

History: En. Sec. 9, Ch. 13, L. 1961.

Rule 9(d). Official document, act, ordinance or statute. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law. In pleading any ordinance or regulation of any county, city, village, or other political subdivision of this state, or any special, local or private statute, or any right derived therefrom, or the laws of another jurisdiction, it is sufficient to refer to the ordinance, regulation, statute or law by its title and the date of its passage, or by the appropriate designation in the official or recognized compilation thereof.

History: En. Sec. 9, Ch. 13, L. 1961.

Rule 9(e). Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

History: En. Sec. 9, Ch. 13, L. 1961.

Rule 9(f). Time and place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

History: En. Sec. 9, Ch. 13, L. 1961.

Rule 9(g). Special damage. When items of special damage are claimed, they shall be specifically stated.

History: En. Sec. 9, Ch. 13, L. 1961.

Rule 10. Form of pleadings

Rule 10(a). Caption — names of parties. Every pleading shall contain a caption setting forth the name, district and county of the court, the title of the action, the number of the action, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

History: En. Sec. 10, Ch. 13, L. 1961.

Rule 10(b). Paragraphs — separate statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

History: En. Sec. 10, Ch. 13, L. 1961.

Rule 10(c). Adoption by reference — exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

History: En. Sec. 10, Ch. 13, L. 1961.

Rule 11. Signing of pleadings. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

History: En. Sec. 11, Ch. 13, L. 1961.

Rule 12. Defenses and objections — when and how presented — by pleading or motion — motion for judgment on pleadings

Rule 12(a). When presented. Except as otherwise provided by statute applicable to particular defendants or proceedings, the responsive pleadings shall be served as follows: A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, or within 20 days after the completion of service of process as provided in Rule 4, unless the court directs otherwise when service of process is made pursuant to Rule 4D(4). A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order or such time as the order otherwise directs. Unless a different time is fixed by the court, when a motion permitted by these rules is served, the responsive pleading shall be served within 20 days after notice of the court's action if the court denies the motion or postpones its disposition until trial on the merits, and shall be served within 20 days after the service of the more definite statement if the court grants a motion for a more definite statement.

History: En. Sec. 12, Ch. 13, L. 1961; amd Sec. 1, Ch. 89, L. 1963.

Rule 12(b). How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to the claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

(i) The cases in which place of trial may be changed are specified in section 25-2-201, Montana Code Annotated.

(ii) If the county designated in the complaint is not the proper county for trial of the action, the defendant must at the time of his first appearance request by motion that the trial be had in the proper county. Every defense in law or fact, to a claim for relief in any pleading which defendant desires to present by way of motion as hereinabove provided must be joined with, or inserted in, the motion requesting a change in the place of trial. If the court in which the action is commenced grants the request for change of venue, that court shall not consider nor pass upon other defenses in law, or fact, presented by the motion, but such shall be considered and decided by the court sitting in the proper county after the transfer has been completed. No request for change of venue is waived by being joined in a motion with other defenses or objections in law or fact.

(iii) Any request for change in place of trial for grounds 2 and 3 of section 25-2-201, Montana Code Annotated, must be presented by motion within 20 days after the answer to the complaint, or to the cross-claim where a cross-claim is filed, or the reply to any answer, in those cases in which a reply is authorized, has been filed; except that whenever at some time more than 20 days after the last pleading has been filed an event occurs which thereafter affords good cause to believe that an impartial trial cannot be had under ground 2 of said section 25-2-201, and competent proof is submitted to the court that such cause of impartiality did not exist within the 20-day period after the last pleading was filed, then the court may entertain a motion to change the place of trial under ground 2 of section 25-2-201 within 20 days after that later event occurs.

(iv) With respect to [ground 4 of section 93-2906, R.C.M. 1947], the party who disqualifies a district judge, and who desires a change of venue, must include such request in a motion filed along with the affidavit of disqualification. If the party who does not disqualify the district judge desires a change of venue, he shall make such request by motion within 5 days after being served with a copy of the affidavit of disqualification. Unless the parties have agreed in writing upon another district judge, or upon a member of the bar as judge pro tempore, the disqualified district judge must either call in another district judge within 15 days after filing of the affidavit of disqualification, or 10 days after filing of the motion for change of venue, or, if no other judge is called in, grant the motion for change of venue. If any other qualified district judge shall be called in, as herein provided, and shall, within 30 days after the motion for change of venue has been filed, appear and assume jurisdiction of the cause and of all matters and proceedings therein, no change of the place of trial shall be made. If the other qualified district judge called in, as herein provided, fails to appear and assume jurisdiction within 30 days after the motion for change of venue has been filed, then the disqualified judge must immediately grant the motion and order a change in the place of trial to some other county.

History: En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 12(c). Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

History: En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963.

Rule 12(d). Preliminary hearings. The defenses specifically enumerated (1) [to] (7) in subdivision (b) of this rule whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until trial.

History: En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 12(e). Motion for more definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

History: En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963.

Rule 12(f). Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

History: En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963.

Rule 12(g). Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

History: En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 12(h). Waiver or preservation of certain defenses. (1) A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

History: En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 13. Counterclaim and cross-claim

Rule 13(a). Compulsory counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

History: En. Sec. 13, Ch. 13, L. 1961.

Rule 13(b). Permissive counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

History: En. Sec. 13, Ch. 13, L. 1961.

Rule 13(c). Counterclaim exceeding opposing claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

History: En. Sec. 13, Ch. 13, L. 1961.

Rule 13(d). Counterclaim against the state. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the state of Montana or any of its governmental subdivisions, agencies or officers.

History: En. Sec. 13, Ch. 13, L. 1961.

Rule 13(e). Counterclaim maturing or acquired after pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

History: En. Sec. 13, Ch. 13, L. 1961.

Rule 13(f). Omitted counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

History: En. Sec. 13, Ch. 13, L. 1961.

Rule 13(g). Cross-claim against coparty. A pleading may state as a cross-claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

History: En. Sec. 13, Ch. 13, L. 1961.

Rule 13(h). Joinder of additional parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

History: En. Sec. 13, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 13(i). Separate trials — separate judgment. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b), even if the claims of the opposing party have been dismissed or otherwise disposed of.

History: En. Sec. 13, Ch. 13, L. 1961.

Rule 14. Third-party practice

Rule 14(a). When defendant may bring in third party. At any time after commencement of the action a defendant as a third-party plaintiff may cause to be served a summons and complaint upon a person not a party to the action who is or may be liable to such third-party plaintiff for all or part of the plaintiff's claim against him. The person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move for severance, separate trial, or dismissal of the third-party claim; the court may direct a final judgment upon either the original claim or the third-party claim alone in accordance with the provisions of Rule 54(b). A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

History: En. Sec. 14, Ch. 13, L. 1961.

Rule 14(b). When plaintiff may bring in third party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

History: En. Sec. 14, Ch. 13, L. 1961.

Rule 15. Amended and supplemental pleadings

Rule 15(a). Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

History: En. Sec. 15, Ch. 13, L. 1961.

Rule 15(b). Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

History: En. Sec. 15, Ch. 13, L. 1961.

Rule 15(c). Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The requirements of clauses (1) and (2) hereof are satisfied with respect to any city, village, town, school district, county, or public agency, board or officer of such public bodies, and with respect to the state or any state board, agency or officer thereof, to be brought into the action as defendant, if process is served as provided by Rule 4D(2)(g) and (h) for service upon such defendant.

History: En. Sec. 15, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 15(d). Supplemental pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

History: En. Sec. 15, Ch. 13, L. 1961.

Rule 16. Pretrial procedure — formulating issues. In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions.

History: En. Sec. 16, Ch. 13, L. 1961.

IV. Parties

Rule 17. Parties plaintiff and defendant — capacity

Rule 17(a). Real party in interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the state of Montana so provides, an action for the use or benefit of another shall be brought in the name of the state of Montana. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

History: En. Sec. 17, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 17(b). Capacity to sue or be sued. The capacity of persons to sue or be sued shall be determined by appropriate statutory provisions.

History: En. Sec. 17, Ch. 13, L. 1961.

Rule 17(c). Infants or incompetent persons. Whenever an infant or incompetent person has a representative, such as a general guardian, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person, or in any case where the court deems it expedient a guardian ad litem may be appointed to represent an infant or incompetent person, even though the infant or incompetent person may have a general guardian and may have appeared by him.

History: En. Sec. 17, Ch. 13, L. 1961.

Rule 18. Joinder of claims and remedies

Rule 18(a). Joinder of claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims either legal or equitable or both as he has against an opposing party or coparty.

History: En. Sec. 18, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 18(b). Joinder of remedies — fraudulent conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money. This rule shall not be applied in tort cases so as to permit the joinder of a liability or indemnity insurance carrier, unless such carrier is by law or contract directly liable to the person injured or damaged.

History: En. Sec. 18, Ch. 13, L. 1961.

Rule 19. Joinder of persons needed for just adjudication

Rule 19(a). Persons to be joined if feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

History: En. Sec. 19, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 19(b). Determination by court of whenever joinder not feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the peron's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

History: En. Sec. 19, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 19(c). Pleading reasons for nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

History: En. Sec. 19, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 19(d). Exception of class actions. This rule is subject to the provisions of Rule 23.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 20. Permissive joinder of parties

Rule 20(a). Permissive joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

History: En. Sec. 20, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 20(b). Separate trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

History: En. Sec. 20, Ch. 13, L. 1961.

Rule 21. Misjoinder and nonjoinder of parties. Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

History: En. Sec. 21, Ch. 13, L. 1961.

Rule 22. Interpleader

Rule 22(a). By joinder, cross-claim or counterclaim. Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

History: En. Sec. 22, Ch. 13, L. 1961.

Rule 22(b). By substitution. A defendant against whom an action is pending upon a contract, or for specific real or personal property, at any time before answer, upon affidavit that a person not a party to the action and without collusion with him makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, may apply to the court for an order to substitute such person in his place and to discharge him from liability to either party on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct, and the court, in its discretion, may make the order.

History: En. Sec. 22, Ch. 13, L. 1961.

Rule 23. Class actions

Rule 23(a). Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

History: En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 23(b). Class actions maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

History: En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 23(c). Determination by order whether class action to be maintained — notice — judgment — actions conducted partially as class actions. (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

History: En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 23(d). Order in conduct of actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

History: En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 23(e). Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 23(f). Security for costs. Security for costs and charges, which may be awarded against a representative party, may be required by an opposing party. When required, all proceedings in the action must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the representative party by judgment, or in the progress of the action, not exceeding the sum of $1,000. A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking is executed and filed.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 23.1. Derivative actions by shareholders. In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 23.2. Actions relating to unincorporated associations. An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 24. Intervention

Rule 24(a). Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

History: En. Sec. 24, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 24(b). Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

History: En. Sec. 24, Ch. 13, L. 1961.

Rule 24(c). Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene. When the constitutionality of an act of the legislative assembly affecting the public interest is drawn in question in any action to which neither the state nor any agency or officer thereof is a party, the court shall notify the attorney general of the state and the attorney general may within 20 days thereafter intervene in the same manner on behalf of the state.

History: En. Sec. 24, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 25. Substitution of parties

Rule 25(a). Death. (1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. If substitution is not made within a reasonable time, the action may be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(3) After a verdict is rendered or an order for judgment is made in any action, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action survives by law, and substitution of parties shall be allowed as in other cases.

History: En. Sec. 25, Ch. 13, L. 1961.

Rule 25(b). Incompetency. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his guardian or may appoint a guardian ad litem for that purpose.

History: En. Sec. 25, Ch. 13, L. 1961.

Rule 25(c). Transfer of interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

History: En. Sec. 25, Ch. 13, L. 1961.

Rule 25(d). Substitution of successor to public officer. When an officer of the state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the constitution of the state. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object. If substitution is not made within a reasonable time, the action may be dismissed as to such public officer. When an officer of the class described herein may sue or be sued in his official capacity, he may be described as a party by his official title and not by name, subject to the power of the court, upon motion or on its own initiative, to require his name to be added. Unless his name is so added, no formal order of substitution is necessary.

History: En. Sec. 25, Ch. 13, L. 1961.

V. Depositions and Discovery

Rule 26. General provisions governing discovery

Rule 26(a). Discovery methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

History: En. Sec. 26, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 26(b). Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature,

custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

History: En. Sec. 26, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 26(c). Protective orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

History: En. Sec. 26, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 26(d). Sequence and timing of discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

History: En. Sec. 26, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 26(e). Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

History: En. Sec. 26, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 27. Depositions before action or pending appeal

Rule 27(a). Before action. (1) Petition. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any district court of the state of Montana may file a verified petition in the district court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a district court of the state of Montana but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for an order described in the petition. At least 20 days before the date of hearing the notice shall be served in the manner provided in Rule 4, and for persons not personally served in the manner provided in Rule 4D, who do not appear, an attorney shall be appointed who shall represent them and cross-examine the deponent. If an expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

(3) Order and examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of deposition. If a deposition to perpetuate testimony is taken under these rules it may be used in any action involving the same subject matter subsequently brought in a district court of the state of Montana in accordance with the provisions of Rule 26(d).

History: En. Sec. 27, Ch. 13, L. 1961.

Rule 27(b). Pending appeal. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

History: En. Sec. 27, Ch. 13, L. 1961.

Rule 27(c). Perpetuation by petition. This rule does not limit the power of a court to entertain a proceeding to perpetuate testimony.

History: En. Sec. 27, Ch. 13, L. 1961.

Rule 28. Persons before whom depositions may be taken

Rule 28(a). Within the United States. Within the state of Montana, depositions shall be taken before a person authorized by the laws of this state to administer oaths; without the state, but within the United States, or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before a person authorized to administer oaths by the laws of this state, the United States, or of the place where the examination is held; within or without the state of Montana, depositions may also be taken before a person appointed by the court in which the action is pending, which persons so appointed shall have the power to administer oaths and take testimony.

History: En. Sec. 28, Ch. 13, L. 1961.

Rule 28(b). In foreign countries. In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to letter rogatory. A commission or a letter rogatory shall be issued on application and notice, and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

History: En. Sec. 28, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 28(c). Disqualification for interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

History: En. Sec. 28, Ch. 13, L. 1961.

Rule 28(d). Depositions to be used in other states. Whenever the deposition of any person is to be taken in this state pursuant to the laws of another state or the United States or of another country for use in proceedings there, the district court of the county where the witness is to be served, upon proof that notice has been duly served, may issue, pursuant to Rule 45(d), the necessary subpoenas.

History: En. Sec. 28, Ch. 13, L. 1961.

Rule 28(e). Deposition to be taken in sister states and foreign countries for use in this state. Whenever the deposition of any person is to be taken in a sister state or a foreign country, or any other jurisdiction, foreign or domestic, for use in this state, pursuant either to notice or stipulation, the clerk or equivalent officer of any court having jurisdiction at the place where the witness is to be served or the deposition taken, upon proof that notice has been duly served for taking of the deposition or that the parties have stipulated to such taking, may issue the necessary subpoenas or equivalent court instruments to require such witness to attend for the taking of the deposition at the time and place in the sister state or foreign country, or any other jurisdiction, foreign or domestic, designated in the notice or stipulation.

History: En. Sup. Ct. Ord. 10750-8, Sept. 10, 1968, eff. Jan. 1, 1969.

Rule 29. Stipulations regarding discovery procedure. Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

History: En. Sec. 29, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 30. Depositions upon oral examination

Rule 30(a). When depositions may be taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(c), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

History: En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 30(b). Notice of examination; general requirements — special notice — nonstenographic recording — production of documents and things — deposition of organization. (1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subdivision (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

History: En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 30(c). Examination and cross-examination — record of examination — oath — objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rule 43(b). The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

History: En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 30(d). Motion to terminate or limit examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

History: En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 30(e). Submission to witness — changes — signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

History: En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 30(f). Certification and filing by officer — exhibits — copies — notice of filing. (1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

History: En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 30(g). Failure to attend or to serve subpoena — expenses. (1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

History: En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 31. Depositions upon written questions

Rule 31(a). Serving questions — notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

History: En. Sec. 31, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 31(b). Officer to take responses and prepare record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

History: En. Sec. 31, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 31(c). Notice of filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

History: En. Sec. 31, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 32. Use of depositions in court proceedings

Rule 32(a). Use of depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

History: En. Sec. 32, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 32(b). Objections to admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

History: En. Sec. 32, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 32(c). Effect of taking or using depositions. A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subdivision (a)(2) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

History: En. Sec. 32, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 32(d). Effect of errors and irregularities in depositions. (1) As to notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to disqualification of officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to taking of deposition. (A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to completion and return of deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

History: En. Sec. 32, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 33. Interrogatories to parties

Rule 33(a). Availability — procedures for use. Any party may serve upon any other party written interrogatories to be answered by the parties served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. A party serving interrogatories upon an adverse party shall file the same in the court in which the action is pending.

Each interrogatory shall be answered separately and fully in writing under oath unless it is objected to in which event the reasons for objection shall be stated in lieu of an answer. The party answering the interrogatories shall set forth a verbatim recopy of each of the interrogatories, followed by the answer thereto, and shall file the answers in the court in which the action is pending. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

History: En. Sec. 33, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750, Nov. 28, 1966, eff. Jan. 1, 1967; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 33(b). Scope — use at trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

History: En. Sec. 33, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750, Nov. 28, 1966, eff. Jan. 1, 1967; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 33(c). Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

History: En. Sec. 33, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750, Nov. 28, 1966, eff. Jan. 1, 1967; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 34. Production of documents and things and entry upon land for inspection and other purposes

Rule 34(a). Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

History: En. Sec. 34, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 34(b). Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

History: En. Sec. 34, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 34(c). Persons not parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

History: En. Sec. 34, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 35. Physical and mental examination of persons

Rule 35(a). Order for examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

History: En. Sec. 35, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 35(b). Report of examining physician. (1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial, or may hold him in contempt of court, or both.

(2) Waiver of privilege. Either by (1) requesting and obtaining a report of the examination ordered as provided herein, or by taking the deposition of the examiner, or by (2) commencing an action or asserting a defense which places in issue the mental or physical condition of a party to the action, the party examined or a party to the action waives any privilege he may have in that action or any other action involving the same controversy, regarding the testimony of every person who has treated, prescribed, consulted, or examined or may thereafter treat, consult, prescribe or examine, such party in respect to the same mental or physical condition; but such waiver shall not apply to any treatment, consultation, prescription or examination for any mental or physical condition not related to the pending action. Upon motion seasonably made, and upon notice and for good cause shown, the court in which the action is pending, may make an order prohibiting the introduction in evidence of any such portion of the medical record of any person as may not be relevant to the issues in the pending action.

(3) This subdivision also applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

History: En. Sec. 35, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-6, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 36. Requests for admissions

Rule 36(a). Request for admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action, only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answers shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

History: En. Sec. 36, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 36(b). Effect of admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

History: En. Sec. 36, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 37. Failure to make discovery: sanctions

Rule 37(a). Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the

proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) Evasive or incomplete answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of expenses of motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

History: En. Sec. 37, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 37(b). Failure to comply with order. (1) Sanctions by court in district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

History: En. Sec. 37, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 37(c). Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

History: En. Sec. 37, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 37(d). Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

History: En. Sec. 37, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

VI. Trials

Rule 38. Jury trial of right

Rule 38(a). Right reserved. The right of trial by jury as declared by The Constitution of the State of Montana or as given by a statute of the state of Montana shall be preserved to the parties inviolate.

History: En. Sec. 38, Ch. 13, L. 1961.

Rule 38(b). Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

History: En. Sec. 38, Ch. 13, L. 1961.

Rule 38(c). [Demand] — specification of issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

History: En. Sec. 38, Ch. 13, L. 1961.

Rule 38(d). Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A waiver of trial by jury is not revoked by an amendment of a pleading asserting only a claim or defense arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

History: En. Sec. 38, Ch. 13, L. 1961.

Rule 39. Trial by jury or by the court

Rule 39(a). By jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist.

History: En. Sec. 39, Ch. 13, L. 1961.

Rule 39(b). By the court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court upon motion or of its own initiative may on 10 days' notice to the parties order a trial by a jury of any or all issues.

History: En. Sec. 39, Ch. 13, L. 1961.

Rule 39(c). Advisory jury and trial by consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

History: En. Sec. 39, Ch. 13, L. 1961.

Rule 40. Assignment of cases for trial. The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the court deem expedient. Precedence shall be given to actions entitled thereto by any statute of the state of Montana.

History: En. Sec. 40, Ch. 13, L. 1961.

Rule 41. Dismissal of actions

Rule 41(a). Voluntary dismissal — effect thereof. (1) By plaintiff — by stipulation. Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the state of Montana, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, which ever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice.

(2) By order of court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

History: En. Sec. 41, Ch. 13, L. 1961; amd. Sec. 1, Ch. 111, L. 1963.

Rule 41(b). Involuntary dismissal — effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or failure to join a party under Rule 19, operates as an adjudication upon the merits.

History: En. Sec. 41, Ch. 13, L. 1961; amd. Sec. 1, Ch. 111, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 41(c). Dismissal of counterclaim, cross-claim, or third-party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served, or, if there is none, before the introduction of evidence at the trial or hearing.

History: En. Sec. 41, Ch. 13, L. 1961; amd. Sec. 1, Ch. 111, L. 1963.

Rule 41(d). Costs of previously-dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

History: En. Sec. 41, Ch. 13, L. 1961; amd. Sec. 1, Ch. 111, L. 1963.

Rule 41(e). Failure to serve summons. No action heretofore or hereafter commenced shall be further prosecuted as to any defendant who has not appeared in the action or been served in the action as herein provided within 3 years after the action has been commenced, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within 1 year, or unless summons issued within one year shall have been served and return made and filed with the clerk of the court within 3 years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said 3 years. When more than one defendant has been named in an action, the action may within the discretion of the trial court be further prosecuted against any defendant who has appeared within 3 years, or upon whom summons which has been issued within 1 year has been served and return made and filed with the clerk within 3 years as herein required.

History: En. Sec. 1, Ch. 111, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

Rule 42. Consolidation — separate trials

Rule 42(a). Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

History: En. Sec. 42, Ch. 13, L. 1961.

Rule 42(b). Separate trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

History: En. Sec. 42, Ch. 13, L. 1961.

Rule 43. Evidence

Rule 43(b). Scope of examination and cross-examination. A party may interrogate any unwilling or hostile witness by leading questions. Either party, if he shall call as a witness in his behalf, the opposite party, an employee or agent of the opposite party, or an officer, director, employee or agent of a public or private corporation, or of a partnership or association which is an opposite party, or any person who at the time of the happening of the transaction out of which the suit or proceeding grew, was an employee or agent of the opposite party, or an officer, director, employee or agent of a public or private corporation, or of a partnership or association which is an opposite party, shall have the right to examine and cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling and examining such witness shall not be bound to accept such answers as true. The witness thus called may be contradicted and impeached by or on behalf of the opposite party, as well as by or on behalf of the party calling the witness, and may be examined by the opposite party upon the subject matter of his examination in chief, but any such examination by the opposite party shall be under the rules of direct examination unless the witness is unwilling or hostile with reference to the opposite party, in which case, the court may, in its discretion, allow the witness to be cross-examined.

History: En. Sec. 43, Ch. 13, L. 1961.

Rule 43(c). Record of excluded evidence. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

History: En. Sec. 43, Ch. 13, L. 1961.

Rule 43(d). Affirmation in lieu of oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

History: En. Sec. 43, Ch. 13, L. 1961.

Rule 43(e). Evidence on motions. Except as otherwise provided in Rule 56, when a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

History: En. Sec. 43, Ch. 13, L. 1961.

Rule 43(f). Interpreters. The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 44. Proof of official record

Rule 44(a). Authentication. (1) Domestic. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A

final certification may be made by a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

History: En. Sec. 44, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 44(b). Lack of record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

History: En. Sec. 44, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 44(c). Other proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

History: En. Sec. 44, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 44.1. Determination of foreign law. A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 45. Subpoena

Rule 45(a). For attendance of witnesses — form — issuance. Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

History: En. Sec. 45, Ch. 13, L. 1961.

Rule 45(b). For production of documentary evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

History: En. Sec. 45, Ch. 13, L. 1961.

Rule 45(c). Service. A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service is made by exhibiting the original and delivering a true copy to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and 1 day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

History: En. Sec. 45, Ch. 13, L. 1961.

Rule 45(d). Subpoena for taking depositions — place of examinations. (1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of court where the action is pending, or for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) A resident of the state may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the state may be required to attend in any county of the state wherein he is served with a subpoena or at any other convenient place as is fixed by order of court.

History: En. Sec. 45, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 45(e). Subpoena for a hearing or trial. At the request of any party subpoenas for attendance at a hearing or trial shall be issued as provided by Rule 45(a), and such subpoenas for a hearing or trial in a district court may be served at any place within the state.

History: En. Sec. 45, Ch. 13, L. 1961.

Rule 45(f). Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

History: En. Sec. 45, Ch. 13, L. 1961.

Rule 46. Exceptions unnecessary. Formal exceptions to rulings, orders, or findings of the court are unnecessary; but for all purposes it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

History: En. Sec. 46, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Rule 47. Jurors

Rule 47(a). Examination of jurors. The court shall permit the parties or their attorneys to conduct the examination of prospective jurors under its supervision. The court may supplement the examination by such further inquiry as it deems proper. Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge.

History: En. Sec. 47, Ch. 13, L. 1961.

Rule 47(b). Manner of selection and order of examination of jurors. From the entire jury panel, an initial panel of 20 jurors shall be called in the first instance, and before any voir dire examination of the jury shall be had. Examination of all jurors in the initial panel shall be completed by the plaintiff before examination by the defendant. If challenges for cause are allowed, an additional juror shall be called from the entire panel immediately upon the allowance of challenge, and the juror called to replace the juror excused for cause shall take the number of the juror who has been excused, to provide a full initial panel of 20 jurors, whose examination shall be completed before any peremptory challenges are made. When the voir dire examination has been completed, each side shall have four peremptory challenges, and they shall be exercised by the plaintiff first striking one, the defendant than striking one, and so on, until each side has exhausted or waived its right. In event one or more alternate jurors are called, the next jurors remaining in the initial panel, if any, shall be called by the clerk to be the alternate jurors. In event all jurors remaining of original initial panel of 20 jurors, including those substituted for those jurors excused for cause, have been subjected to peremptory challenge, then the clerk shall call additional jurors from the remainder of the jury panel to provide alternate jurors who will be subject to challenge as provided by law. In event there is more than one party defendant, and should it appear that each defendant is entitled to peremptory challenges, then the original panel shall be increased to provide four additional jurors for each defendant who is entitled to exercise peremptory challenges. The clerk shall keep a record of the order in which jurors are called, and in event the entire initial panel has not been exhausted by challenges, the court shall excuse sufficient of the last called jurors until a jury of 12 persons and the determined number of alternates shall remain to make up the trial jury.

History: En. Sec. 47, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Rule 47(c). Alternate jurors. The court may direct that one or two jurors in addition to the regular panel be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury arrives at its verdict, become unable or disqualified to perform their duties. An alternate juror shall not join the jury in its deliberation unless called upon by the court to replace a member of the jury. His conduct during the period in which the jury is considering its verdict shall be regulated by instructions of the trial court. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged after the jury arrives at its verdict. If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed by subdivision (b) of this rule. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates.

History: En. Sec. 47, Ch. 13, L. 1961.

Rule 48. Juries — verdict. At least two-thirds in number of any jury may render a verdict or finding, and such verdict or finding so rendered shall have the same force and effect as if all such jury concurred therein. The parties may stipulate that the jury shall consist of less number than 12.

History: En. Sec. 48, Ch. 13, L. 1961.

Rule 49. Special verdicts and interrogatories

Rule 49(a). Special verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

History: En. Sec. 49, Ch. 13, L. 1961.

Rule 49(b). General verdict accompanied by answer to interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

History: En. Sec. 49, Ch. 13, L. 1961.

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict

Rule 50(a). Motion for directed verdict — when made, effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

History: En. Sec. 50, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 50(b). Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after service of notice of entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Motions provided by this subdivision shall be heard and determined within the times provided by Rule 59 for the hearing and determination of motions for new trial.

History: En. Sec. 50, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Rule 50(c). Motion for judgment notwithstanding the verdict — conditional rulings on grant of motion. (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the supreme court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the supreme court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after service of notice of entry of the judgment notwithstanding the verdict.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 50(d). Motion for judgment notwithstanding the verdict — denial of motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the supreme court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the supreme court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 51. Instructions to jury — objection. The court may, during the trial or at the close of the evidence, request each of the parties to submit proposed written instructions on the law of the case. No party may assign as error the failure to instruct on any point of law unless he offers an instruction thereon. The court shall rule upon the proposed instructions and may prepare other written instructions to be given of its own motion and shall submit to the parties the instructions that will be given and provide opportunity to make objections. Objections made shall specify and state the particular grounds on which the instruction is objected to and it shall not be sufficient in stating the ground of such objection to state generally the instruction does not state the law or is against the law, but such ground of objection shall specify particularly wherein the instruction is insufficient or does not state the law, or what particular clause therein is objected to. All objections and rulings thereon shall be made out of the presence of the jury. No exceptions are necessary to the rulings of the court on the giving or the refusal of instructions. The court shall read to the jury the instructions given before the arguments of counsel are commenced.

History: En. Sec. 51, Ch. 13, L. 1961.

Rule 52. Findings by the court

Rule 52(a). Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

History: En. Sec. 52, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Rule 52(b). Amendment. Upon motion of a party made not later than 10 days after notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

History: En. Sec. 52, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Aug. 1, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd.

Sup. Ct. Ord. 10750-7, May 21, 1969, eff. July 1, 1969; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Rule 53. Masters

Rule 53(a). Appointment and compensation. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

History: En. Sec. 53, Ch. 13, L. 1961.

Rule 53(b). Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

History: En. Sec. 53, Ch. 13, L. 1961.

Rule 53(c). Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury.

History: En. Sec. 53, Ch. 13, L. 1961.

Rule 53(d). Proceedings. (1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte, or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of accounts. When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

History: En. Sec. 53, Ch. 13, L. 1961.

Rule 53(e). Report. (1) Contents and filing. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) In nonjury actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In jury actions. In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) Stipulations as to findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Draft report. Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

History: En. Sec. 53, Ch. 13, L. 1961.

VII. Judgment

Rule 54. Judgments — costs

Rule 54(a). Definition — form. A judgment is the final determination of the rights of the parties in an action or proceeding and as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

History: En. Sec. 54, Ch. 13, L. 1961.

Rule 54(b). Judgment upon multiple claims or involving multiple parties. When multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

History: En. Sec. 54, Ch. 13, L. 1961.

Rule 54(c). Demand for judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

History: En. Sec. 54, Ch. 13, L. 1961.

Rule 54(d). Costs. Except when express provision therefor is made either in a statute of the state of Montana or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the state of Montana, its officers, agencies, and political subdivisions shall be imposed only to the extent permitted by law.

History: En. Sec. 54, Ch. 13, L. 1961.

Rule 55. Default

Rule 55(a). Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

History: En. Sec. 55, Ch. 13, L. 1961.

Rule 55(b). Judgment. Judgment by default may be entered as follows:

(1) By the clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person, and has been personally served, otherwise than by publication or personal service outside of this state.

(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative, or guardian ad litem, who has appeared therein. If the party against whom judgment by default

is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the state of Montana.

History: En. Sec. 55, Ch. 13, L. 1961; amd. Sup. Ct. Ord. June 1, 1964, eff. July 1, 1964.

Rule 55(c). Default — setting aside — extension of time by court or stipulation of parties. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b). No default of any party shall be entered, and no default judgment shall be entered against any party, except upon application of the opposing party. Before entering the default of any person who has been served outside the boundaries of the state of Montana, the court may, in its discretion, appoint a representative for any such person even though such person has not appeared. Any stipulation for extension of time between the parties or their counsel, whether in writing or made verbally before the court, shall be effective to extend the time for serving and/or filing any appearance, motion, pleading or proceeding, according to the terms of such stipulation. In any case if a party in default shall serve and file his appearance, motion, pleading or proceeding prior to application to the clerk for default, then such defaulting party shall not thereafter be considered in default as to that particular appearance, motion, pleading, or proceeding.

History: En. Sec. 55, Ch. 13, L. 1961.

Rule 55(d). Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

History: En. Sec. 55, Ch. 13, L. 1961.

Rule 56. Summary judgment

Rule 56(a). For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

History: En. Sec. 56, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 56(b). For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

History: En. Sec. 56, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 56(c). Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

History: En. Sec. 56, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 56(d). Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

History: En. Sec. 56, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 56(e). Form of affidavits — further testimony — defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

History: En. Sec. 56, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 56(f). When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

History: En. Sec. 56, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 56(g). Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

History: En. Sec. 56, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 57. Declaratory judgments. The procedure for obtaining a declaratory judgment pursuant to Title 27, chapter 8, Montana Code Annotated, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39, subject to the provisions of section 27-8-302, Montana Code Annotated. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

History: En. Sec. 57, Ch. 13, L. 1961.

Rule 58. Entry of judgment. Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The entry of the judgment shall not be delayed for the taxing of costs.

History: En. Sec. 58, Ch. 13, L. 1961.

Rule 59. New trials — amendment of judgment

Rule 59(a). Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues for any of the reasons provided by the statutes of the state of Montana.

A motion for new trial shall state with particularity the grounds therefor, it not being sufficient merely to set forth the statutory grounds, but the motion may be amended, upon reasonable notice, up to and including the time of hearing the motion.

On motion for a new trial in an action tried without a jury, the court may take additional testimony, amend the findings of fact and conclusions of law or make new findings and conclusions, set aside, vacate, modify or confirm any judgment that may have been entered or direct the entry of a new judgment.

History: En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 59(b). Time for motion. A motion for a new trial shall be served not later than 10 days after service of notice of the entry of the judgment.

History: En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Rule 59(c). Time for serving affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has

10 days after such service within which to serve opposing affidavits, which periods may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

History: En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Rule 59(d). Time for hearing on motion. Hearing on the motion shall be had within 10 days after it has been served, or within 10 days after the party opposing the motion for new trial has served his affidavits as set forth in subparagraph (c) hereinabove except that at any time after the notice of hearing on the motion has been served the court may issue an order continuing the hearing for not to exceed 30 days. In case the hearing is continued by the court, it shall be the duty of the court to hear the same at the earliest practicable date thereafter, and the court shall rule upon and decide the motion within 15 days after the same is submitted. If the court shall fail to rule upon the motion within said time, the motion shall, at the expiration of said period, be deemed denied.

The decision on the motion may be entered in the minutes of the court, or may be made in writing in chambers or in any county in the state where the judge may be, and be filed with the clerk of court in the county where the action is pending. Upon the hearing, reference may be had in all cases to the pleadings and the orders of the court on file, and reference may also be had to any depositions and documentary evidence offered on the trial, and to the proceedings on the trial and, when necessary, reference may be had to the notes of the court reporter.

If the motion is not noticed up for hearing and no hearing is held thereon, it shall be deemed denied as of the expiration of the period of time within which hearing is required to be held under this Rule 59.

History: En. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Rule 59(e). On initiative of court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion.

History: En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 59(f). Order granting new trial. Any order of the court granting a new trial, shall specify the grounds therefor with sufficient particularity as to apprise the parties and the appellate court of the rationale underlying the ruling, and this may be done in the body of the order, or in an attached opinion.

History: En. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 59(g). Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than 10 days after the service of the notice of the entry of the judgment, and may be combined with the motion for a new trial herein provided for. This motion shall be heard and determined within the time provided hereinabove with respect to a motion for a new trial.

History: En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Sept. 7 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969; amd. and redes. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 60. Relief from judgment or order

Rule 60(a). Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record, and in pleadings, and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

History: En. Sec. 60, Ch. 13, L. 1961.

Rule 60(b). Mistakes — inadvertence — excusable neglect — newly discovered evidence — fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) when a defendant has been personally served, whether in lieu of publication or not, not more than 60 days after the judgment, order or proceeding was entered or taken, or, in a case where notice of entry of judgment is required by Rule 77(d), not more than 60 days after service of notice of entry of judgment. When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within 180 days after the rendition of any judgment in such action, to answer to the merits of the original action. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as may be required by law, or to set aside a judgment for fraud upon the court.

History: En. Sec. 60, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Aug. 1, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 60(c). Time for hearing and determining motions. Motions provided by subdivisions (a) and (b) of this rule shall be heard and determined within the times provided by Rule 59 in the case of motions for new trials and amendment of judgment.

History: En. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Rule 61. Harmless error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

History: En. Sec. 61, Ch. 13, L. 1961.

Rule 62. Stay of proceedings to enforce a judgment

Rule 62(a). Superseded — M.R.App.Civ.P., Rule 7.

History: En. Sec. 62, Ch. 13, L. 1961.

Rule 62(b). Stay on motion for new trial or for judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the district court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

History: En. Sec. 62, Ch. 13, L. 1961.

Rule 62(c). Injunction pending appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the district court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

History: En. Sec. 62, Ch. 13, L. 1961.

Rule 62(d). Superseded — M.R.App.Civ.P., Rule 7.

History: En. Sec. 62, Ch. 13, L. 1961.

Rule 62(e). Stay in favor of the state of Montana or agency thereof. When an appeal is taken by the state of Montana or an officer or agency or governmental subdivision thereof, and the operation or enforcement of the judgment is stayed, no security shall be required from the appellant. In all cases, the parties may by written stipulation waive the filing of security.

History: En. Sec. 62, Ch. 13, L. 1961.

Rule 62(g). Power of appellate court not limited. The provisions in this rule do not limit any power of the supreme court of the state of Montana or of a justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

History: En. Sec. 62, Ch. 13, L. 1961.

Rule 62(h). Stay of judgment upon multiple claims. When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

History: En. Sec. 62, Ch. 13, L. 1961.

VIII. Provisional and Final Remedies and Special Proceedings

Rule 64. Seizure of person or property. At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by law.

History: En. Sec. 63, Ch. 13, L. 1961.

Rule 65. Injunctions. The procedure for granting restraining orders and temporary and permanent injunctions shall be as provided by statute.

History: En. Sec. 64, Ch. 13, L. 1961.

Rule 66. Receivers. An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the appointment of and administration of estates by receivers or other similar officers shall be in accordance with the Montana statutes and with the practice heretofore followed in the courts of this state. In all other respects, the action in which the appointment of the receiver is sought or which is brought by or against a receiver is governed by these rules.

History: En. Sec. 65, Ch. 13, L. 1961.

Rule 67. Deposit in court. In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of chapter 8, Title 25, Montana Code Annotated.

History: En. Sec. 66, Ch. 13, L. 1961.

Rule 68. Offer of judgment. At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

History: En. Sec. 67, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 69. Execution. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of and supplementary to execution shall be in accordance with the statutes of the state of Montana. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions.

History: En. Sec. 68, Ch. 13, L. 1961.

Rule 70. Judgment for specific acts — vesting title. If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the court may order the clerk to issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

History: En. Sec. 69, Ch. 13, L. 1961.

Rule 71. Process in behalf of and against persons not parties. When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

History: En. Sec. 70, Ch. 13, L. 1961.

IX. Appeals

Rule 72. Appeal from a district court to the supreme court. When an appeal is permitted by law from a district court to the supreme court of Montana, or in any case where original proceedings are commenced in the supreme court, such appeal or original proceeding shall be taken, perfected, and prosecuted pursuant to the provisions of the Montana Rules of Appellate Civil Procedure and controlling statutes to the extent that they are not superseded by the Montana Rules of Appellate Civil Procedure.

History: En. Sec. 71, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

X. District Courts and Clerks

Rule 77. District courts and clerks

Rule 77(a). District courts always open. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

History: En. Sec. 72, Ch. 13, L. 1961.

Rule 77(b). Trials and hearings — orders in chambers. All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.

History: En. Sec. 72, Ch. 13, L. 1961.

Rule 77(c). Clerk's office and orders by clerk. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

History: En. Sec. 72, Ch. 13, L. 1961.

Rule 77(d). Notice of orders or judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order or judgment is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers.

History: En. Sec. 72, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 77(e). Transmittal of file on removal. Upon the filing of a copy of the petition for removal of any state district court action to the district court of the United States, district of Montana, and a request in writing therefor, the clerk of such state district court shall promptly deliver to the clerk of court of the district court of the United States, district of Montana, all papers then in the original state court file, or theretofore issued and subsequently filed and shall keep in the state court file only the copy of the petition for removal and such papers as were filed with the request for removal.

History: En. Sup. Ct. Ord. 10750-8, Sept. 10, 1968, eff. Jan. 1, 1969; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Rule 80. Stenographer — stenographic report or transcript as evidence. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

History: En. Sec. 73, Ch. 13, L. 1961.

XI. General Provisions

Rule 81. Applicability in general

Rule 81(a). Special statutory proceedings. The statutory proceedings listed in Table A and any other special statutory proceeding, whether or not listed in Table A, are excepted from these rules insofar as they are inconsistent or in conflict with the procedure and practice provided by these rules.

History: En. Sec. 74, Ch. 13, L. 1961.

Rule 81(b). Appeals to district courts. These rules do not supersede the provisions of statutes relating to appeals to or review by the district courts, but shall govern procedure and practice relating thereto insofar as these rules are not inconsistent with such statutes.

History: En. Sec. 74, Ch. 13, L. 1961.

Rule 81(c). Rules incorporated into statutes. Where any statute heretofore or hereafter enacted, whether or not applicable to a special statutory proceeding or listed in any table appended hereto, provides that any act in a civil proceeding in a district court shall be done in the manner provided by law or as in a civil action or as provided by any statute superseded by these rules, such act shall be done in accordance with these rules and the procedure thereon shall conform to these rules, insofar as practicable.

History: En. Sec. 74, Ch. 13, L. 1961.

Rule 82. Jurisdiction and venue unaffected. Except as provided in Rule 4 these rules shall not be construed to extend or limit the jurisdiction of the district courts of Montana or the venue of actions therein.

History: En. Sec. 75, Ch. 13, L. 1961.

Rule 83. Rules by district courts. Each district court, upon agreement of the judges or a majority thereof, may from time to time make and amend rules governing its practice not inconsistent with these rules or other rules prescribed by the supreme court. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the supreme court of this state. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

History: En. Sec. 76, Ch. 13, L. 1961.

Rule 84. Forms. The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

History: En. Sec. 77, Ch. 13, L. 1961.

Rule 85. Title. These rules shall be known as the Montana Rules of Civil Procedure and may be cited as M.R.Civ.P.

History: En. Sec. 78, Ch. 13, L. 1961.

Rule 86. Effective date — statutes superseded

Rule 86(a). Effective date and application to pending proceedings. These rules became effective January 1, 1962. In accordance with Chapter 16, Laws of 1963, proposed amendments to these rules shall be first prepared by the advisory committee, which shall distribute copies thereof to the bench and resident bar of the state for their consideration and suggestions. Submission of proposed amendments to the court shall be made by the advisory committee only after the advisory committee has considered suggestions received from the bench and bar. Submissions to the court shall be noticed by the court by mailing notice, containing copies of the submitted proposals to all district judges and resident attorneys licensed to practice in the Montana courts as shown by the records of the clerk of the court, and the court will receive written suggestions and objections within the time fixed in the notice, which shall be not less than 90 days thereafter. Oral hearings on proposals will be held only on special order of the court. Amendments adopted by the court will become effective on January 1 unless a different time be fixed in the order.

The court will annually, at least 30 days prior to January 1, cause to be published all amendments to these rules which are to become effective on the succeeding January 1, and transmit the same to all judges and resident lawyers of the state. Such rules as are to become effective at times other than January 1 will be published and transmitted at least 30 days prior to their effective date. These rules and amendments govern all proceedings and actions brought after they take effect, and also all further proceedings in actions then pending, except to the extent that in the opinion of the district court their application in a particular action pending when the rules or amendments take effect would not be feasible, or would work injustice, in which event the procedure existing at the time the action was brought applies.

History: En. Sec. 79, Ch. 13, L. 1961; amd. Sup. Ct. Ord. June 1, 1964, eff. July 1, 1964.

Rule 86(b). Statutes superseded. Upon the taking effect of these rules or amendments thereto all statutes and parts of statutes in conflict therewith and the statutes listed in Tables B and C are superseded in respect of practice and procedure in the district courts.

History: En. Sec. 79, Ch. 13, L. 1961; amd. Sup. Ct. Ord. June 1, 1964, eff. July 1, 1964.

Appendix of Forms

Form 1. SUMMONS—OFFICIAL FORM

IN THE DISTRICT COURT OF THE ...... JUDICIAL DISTRICT
OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF ....

A.B.,		Plaintiff	
	vs.		SUMMONS
C.D.,		Defendant	

The State of Montana to the above-named defendant:

You are hereby summoned to answer the complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within 20 days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness my hand and the seal of said court, this .... day of.....

E.F.
Attorney for Plaintiff,
...........................(Address)
...........................Montana.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 2. COMPLAINT ON A PROMISSORY NOTE

1. Defendant on or about June 1, 1958, executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on June 1, 1959, the sum of .... dollars with interest thereon at the rate of .... per cent per annum].[1]

[1] The pleader may use the material in one of the three sets of brackets. This choice will depend upon whether he desires to plead the document verbatim, or by exhibit, or according to its legal effect.

2. Defendant owes to plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the sum of .... dollars, interest, and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 3. COMPLAINT ON AN ACCOUNT

Defendant owes plaintiff .... dollars according to the account hereto annexed as Exhibit A.

Wherefore plaintiff demands judgment against defendant for the sum of .... dollars, interest, and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 4. COMPLAINT FOR GOODS SOLD AND DELIVERED

Defendant owes plaintiff .... dollars for goods sold and delivered by plaintiff to defendant between June 1, 1959, and December 1, 1959.

Wherefore plaintiff demands judgment against defendant for the sum of .... dollars, interest, and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 5. COMPLAINT FOR MONEY LENT

Defendant owes plaintiff .... dollars for money lent by plaintiff to defendant on June 1, 1959, which is now due.

Wherefore plaintiff demands judgment against defendant for the sum of .... dollars, interest, and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 6. COMPLAINT FOR MONEY PAID BY MISTAKE

Defendant owes plaintiff .... dollars for money paid by plaintiff to defendant by mistake on June 1, 1959, under the following circumstances; (stating the circumstances with particularity. See Rule 9(b)).

Wherefore plaintiff demands judgment against defendant for the sum of .... dollars, interest, and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 7. COMPLAINT FOR MONEY HAD AND RECEIVED

Defendant owes plaintiff $10,000 for money had and received from one G.H. on June 1, 1959, to be paid by defendant to plaintiff.

Wherefore plaintiff demands judgment against defendant for the sum of $10,000, interest, and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 8. COMPLAINT FOR NEGLIGENCE

1. On June 1, 1959, in a public highway called State Street, in Helena, Montana, defendant negligently drove a motor vehicle against the plaintiff who was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of .... dollars.

Wherefore plaintiff demands judgment against defendant in the sum of .... dollars and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 9. COMPLAINT FOR NEGLIGENCE WHERE PLAINTIFF IS UNABLE TO DETERMINE DEFINITELY WHETHER THE PERSON RESPONSIBLE IS C.D. or E.F. OR WHETHER BOTH ARE RESPONSIBLE AND WHERE HIS EVIDENCE MAY JUSTIFY A FINDING OF WILLFULNESS OR OF RECKLESSNESS OR OF NEGLIGENCE

1. On June 1, 1959, in a public highway called State Street in Helena, Montana, defendant C.D. or defendant E.F., or both defendants C.D. and E.F. willfully or recklessly or negligently drove or caused to be driven a motor vehicle against the plaintiff who was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of .... dollars.

Wherefore plaintiff demands judgment against C.D. or against E.F. or against both in the sum of .... dollars and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 10. COMPLAINT FOR CONVERSION

On or about December 1, 1959, defendant converted to his own use ten bonds of the .... Company (inserting brief identification as by number and issue) of the value of .... dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of .... dollars, interest and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 11. COMPLAINT FOR SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY LAND

1. On or about December 1, 1958, plaintiff and defendant entered into an agreement in writing a copy of which is hereto annexed as Exhibit A.

2. In accord with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

3. Plaintiff now offers to pay the purchase price.

Wherefore plaintiff demands (1) that defendant be required specifically to perform said agreement; (2) damages in the sum of .... dollars; (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of .... dollars; and (4) judgment for costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 12. COMPLAINT ON CLAIM FOR DEBT AND TO SET ASIDE FRAUDULENT CONVEYANCE UNDER RULE 18(b)

1. Defendant C.D. on or about June 1, 1958, executed and delivered to plaintiff a promissory note (setting forth the note verbatim, or in substance and legal effect, or by annexing a copy, as in Form 2).

2. Defendant C.D. owes to plaintiff the amount of said note and interest.

3. Defendant C.D. on or about December 1, 1958, conveyed all his property, real and personal (or specify and describe) to defendant E.F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to.

Wherefore plaintiff demands judgment (1) against defendant C.D. for .... dollars and interest; (2) that the aforesaid conveyance to defendant E.F. be declared void and the judgment herein be declared a lien on said property; (3) for plaintiff's costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 13. COMPLAINT FOR NEGLIGENCE UNDER FEDERAL EMPLOYERS' LIABILITY ACT (45 U.S.C.A., 51-58)

1. During all the times herein mentioned defendant owned and operated in interstate commerce a railroad which passed through a tunnel located at .... and known as Tunnel No. .....

2. On or about June 1, 1958, defendant was repairing and enlarging the tunnel in order to protect interstate trains and passengers and freight from injury and in order to make the tunnel more conveniently usable for interstate commerce.

3. In the course of thus repairing and enlarging the tunnel on said day defendant employed plaintiff as one of its workmen, and negligently put plaintiff to work in a portion of the tunnel which defendant had left unprotected and unsupported.

4. By reason of defendant's negligence in thus putting plaintiff to work in that portion of the tunnel, plaintiff was, while so working pursuant to defendant's orders, struck and crushed by a rock, which fell from the unsupported portion of the tunnel, and was (describing plaintiff's injuries).

5. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning .... dollars per day. By these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of .... dollars for medicine, medical attendance and hospitalization.

Wherefore plaintiff demands judgment against defendant in the sum of .... dollars and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 14. COMPLAINT FOR INTERPLEADER AND DECLARATORY RELIEF

1. On or about June 1, 1956, plaintiff issued to G.H. a policy of life insurance whereby plaintiff promised to pay to K.L. as beneficiary the sum of ten thousand

dollars upon the death of G.H. The policy required the payment by G.H. of a stipulated premium on June 1, 1956, and annually thereafter as a condition precedent to its continuance in force.

2. No part of the premium due June 1, 1956, was ever paid and the policy ceased to have any force or effect on July 1, 1956.

3. Thereafter, on September 1, 1956, G.H. and K.L. died as the result of a collision between a locomotive and the automobile in which G.H. and K.L. were riding.

4. Defendant C.D. is the duly appointed and acting executor of the will of G.H.; defendant E.F. is the duly appointed and acting executor of the will of K.L.; defendant X.Y. claims to have been duly designated as beneficiary of said policy in place of K.L.

5. Each of defendants C.D., E.F., and X.Y. is claiming that the above-mentioned policy was in full force and effect at the time of the death of G.H.; each of them is claiming to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

6. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G.H.

Wherefore plaintiff demands that the court adjudge:

(1) That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

(2) That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

(3) That, if the court shall determine that said policy was in force at the death of G.H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

(4) That plaintiff recover its costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 15. MOTION TO DISMISS

The defendant moves the court as follows:

(1) To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

(2) To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds: (Here state reasons, such as (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the State of Montana; (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M.N. and X.Y. hereto annexed as Exhibit A and Exhibit B, respectively; (c) (etc.).)

....
Attorney for Defendant

....
Address

Notice of Motion

To: ...., Attorney for Plaintiff:

Please take notice, that the undersigned will bring the above motion for hearing before this court at the courtroom thereof in the Courthouse at ...., Montana, on the .... day of ...., 19.., at .... o'clock ....M. or as soon thereafter as counsel can be heard.

....
Attorney for Defendant

....
Address

History: En. Sec. 80, Ch. 13, L. 1961.

Form 16. ANSWER PRESENTING DEFENSES UNDER RULE 12(b)

FIRST DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

If defendant is indebted to plaintiffs for the goods mentioned in the complaint, he is indebted to them jointly with G.H. G.H. is alive; is a citizen and resident of the State of Montana; is subject to the jurisdiction of this court, as to both service of process and venue; can be made a party, but has not been made one.

THIRD DEFENSE

Defendant admits the allegation(s) contained in paragraph(s) .... of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph(s) .... of the complaint; and denies each and every other allegation contained in the complaint.

FOURTH DEFENSE

The right of action set forth in the complaint did not accrue within .... years next before the commencement of this action, and is therefore barred by the provisions of section (setting forth the particular section or subsection applicable thereto).

COUNTERCLAIM

(Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint.)

CROSS-CLAIM AGAINST DEFENDANT M.N.

(Here set forth the claim constituting a cross-claim against defendant M.N. in the manner in which a claim is pleaded in a complaint.)

History: En. Sec. 80, Ch. 13, L. 1961.

Form 17. ANSWER TO COMPLAINT SET FORTH IN FORM 7, WITH COUNTERCLAIM FOR INTERPLEADER

DEFENSE

Defendant denies the allegations of the complaint to the extent set forth in the counterclaim herein.

COUNTERCLAIM FOR INTERPLEADER

1. Defendant received the sum of ten thousand dollars as a deposit from E.F.

2. Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of it which he claims to have received from E.F.

3. E.F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore defendant demands:

(1) That the court order E.F. to be made a party defendant to respond to the complaint and to this counterclaim.

(2) That the court order the plaintiff and E.F. to interplead their respective claims.

(3) That the court adjudge whether the plaintiff or E.F. is entitled to the sum of money.

(4) That the court discharge defendant from all liability in the premises except to the person it shall adjudge entitled to the sum of money.

(5) That the court award to the defendant its costs and attorney's fees.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 18. SUMMONS AND THIRD-PARTY COMPLAINT—INTERPLEADER

A.B., Plaintiff,
vs.
C.D., Defendant, and
Third-Party Plaintiff,
vs.
E.F., Third-Party Defendant.

THIRD PARTY
SUMMONS
Civil No.....

The State of Montana to the Above-Named Third-Party Defendant:

You are hereby summoned to answer the third-party complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney and upon the attorney for defendant and third-party plaintiff within 20 days after the service of this third-party summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the third-party complaint.

Witness my hand and the seal of said court, this .... day of .....

....
Clerk of the District Court

(COURT SEAL)

G.H.

Attorney for Defendant
and Third-Party Plaintiff
....
(Address)
.................., Montana

The name and address of the
attorney for Plaintiff is:
J.K.

....
(Address)
.................., Montana

A.B.,	Plaintiff,		
vs.			
C.D.,	Defendant, and Third-Party Plaintiff,		.... THIRD-PARTY COMPLAINT Civil No.....
vs.			
E.F.,	Third-Party Defendant.		

1. Plaintiff A.B. has filed against defendant C.D., a complaint, a copy of which is hereto attached as Exhibit C.

2. (Here state the grounds upon which C.D. is entitled to recover from E.F., all or part of what A.B. may recover from C.D. The statement should be framed as in an original complaint.)

Wherefore C.D. demands judgment against third-party defendant E.F. for .... dollars and for costs.

....
Attorney for Third-Party Plaintiff

....
(Address)

History: En. Sec. 80, Ch. 13, L. 1961.

Form 19. MOTION TO INTERVENE AS A DEFENDANT UNDER RULE 24

A.B.,	Plaintiff,		MOTION TO INTERVENE AS A DEFENDANT Civil No...
vs.			
C.D.,	Defendant,		
E.F.,	Applicant for Intervention		

E.F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the grounds (here set forth generally the grounds upon which intervention is sought, in accordance with the right of intervention contained in Rule 24) and as such as a defense to plaintiff's claim presenting (setting forth whether the same relates to questions of law or fact, or both) which are common to the main action.

....
Attorney for E.F., Applicant for Intervention

....
(Address)

NOTICE OF MOTION

(Contents the same as those in Form 15, or notice and motion may be combined in a notice of motion as provided in Rule 7(b).)

INTERVENER'S ANSWER

(Set forth defenses in accordance with the outline contained in Form 16)

History: En. Sec. 80, Ch. 13, L. 1961.

Form 20. MOTION FOR PRODUCTION, ETC., UNDER RULE 34

Plaintiff A.B. moves the court for an order requiring defendant C.D.:

(1) To produce and to permit plaintiff to inspect and to copy each of the following documents:

[Here list the documents and describe each of them]

(2) To produce and permit plaintiff to inspect and to photograph each of the following objects:

[Here list the objects and describe each of them]

(3) To permit plaintiff to enter [here describe property to be entered] and to inspect and to photograph [here describe the portion of the real property and the objects to be inspected and photographed].

Defendant C.D. has the possession, custody, or control of each of the foregoing documents and objects and of the above-mentioned real estate. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.

....
Attorney for Plaintiff

....
Address

....

EXHIBIT A

STATE OF MONTANA
County of Lewis and Clark } SS

A.B., being first duly sworn says:

(1) (Here set forth all that plaintiff knows which shows that defendant has the papers or objects in his possession or control.)

(2) (Here set forth all that plaintiff knows which shows that each of the above-mentioned items is relevant to some issue in the action.)

A.B. (Signed)

(Jurat)

History: En. Sec. 80, Ch. 13, L. 1961.

Form 21. REQUEST FOR ADMISSION UNDER RULE 36

Plaintiff A.B. requests defendant C.D. within .... days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine. [Here list the documents and describe each document.]

2. That each of the following statements is true. [Here list the statements.]

....
Attorney for Plaintiff

....
Address

History: En. Sec. 80, Ch. 13, L. 1961.

Form 22. ALLEGATION OF REASON FOR OMITTING NECESSARY PARTY

John Doe named in this complaint is not made a party to this action [because he is not subject to the jurisdiction of this court]; or [for reasons stated].

History: En. Sec. 80, Ch. 13, L. 1961.

Form 23. SUPERSEDEAS BOND

We the undersigned jointly and severally acknowledge that we and our personal representatives are jointly bound to pay to (respondent) the sum of $.....

(Appellant) has appealed from that certain judgment (or order) (insert descriptive facts) and has obtained an order staying execution from the district court, and the condition of this bond is that if the judgment (or order) appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay the amount directed to be paid by the judgment (or order) or the part of such amount as to which the judgment (or order) is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal. If such payment be made then this bond is void, otherwise to be and remain in full force and effect. If the appellant does not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered on motion of the respondent in his favor against the sureties for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal.

.... Appellant	.... Address
.... Surety	.... Address
.... Surety	.... Address

(Justification of Sureties)
Form of bond approved.

....
Judge

(This form with necessary alterations may be used in any situation covered by Rule 62.)

History: En. Sec. 80, Ch. 13, L. 1961 as added by Sec. 1, Ch. 3. L. 1963.

CHAPTER 21

RULES OF APPELLATE CIVIL PROCEDURE

I. Applicability of Rules

Rule
1. Scope of rules — from what judgment or order an appeal may be taken.
2. What the court may review on an appeal from a judgment.

3. Suspension of the rules.

II. Appeals from Judgments and Orders of District Court

4. How taken.
5. Time for filing notice of appeal.
6. Undertaking for costs on appeal.
7. Stay of judgment or order pending appeal.
8. Sureties and their justification.
9. The record on appeal.
10. Transmission of the record.
11. Docketing the appeal — filing of the record.
12. Effect of dismissal.
13. Acts of executors, administrators or guardians valid when appointment vacated.
14. Ruling against respondent may be reviewed.
15. Remedial powers of the supreme court.
16. Remittitur must be certified to the clerk of the district court.

III. Original Proceedings—Extraordinary Writs

17. Acceptance and manner of conducting.

IV. Appeals in Forma Pauperis

18. Applications and manner of proceeding.

V. General Provisions

19. Record of commissions and oaths.
20. Filing and service.
21. Computation and extension of time.
22. Motions.
23. Briefs.
24. Brief of an amicus curiae.
25. The appendix to the briefs.
26. Filing and service of briefs.
27. Form of briefs, the appendix, motions and other papers.
28. Prehearing conference.
29. Oral argument.
30. Entry and notice of orders and judgments.
31. Interest on judgments.
32. Damages for appeal without merit.
33. Costs.
34. Petitions for rehearing.
35. Notice and copy of decision — remittitur — mandate from United States supreme court.
36. Voluntary dismissal.
37. Substitution of parties.
38. Cases involving constitutional questions where the state is not a party.
39. Calendar — withdrawal of records.
40. Appeals from injunction orders.
41. Statutes and rules amended.
42. Applicability in general.
43. Title — effective date — statutes superseded.

Appendix of Forms

Form
1. Notice of appeal to the supreme court of the state of Montana from a judgment or order of a district court.
2. Affidavit to accompany motion for leave to appeal in forma pauperis.

I. Applicability of Rules

Rule 1. Scope of rules — from what judgment or order an appeal may be taken.

These rules govern procedure in appeals in civil cases to the supreme court of Montana from Montana district courts and original proceedings in the supreme court of Montana. The party applying for original relief is known as the petitioner and the adverse party as the defendant. The party appealing is known as the appellant, and the adverse party as the respondent.

A party aggrieved may appeal from a judgment or order, except when expressly made final by law, in the following cases:

(a) From a final judgment entered in an action or special proceeding commenced in a district court, or brought into a district court from another court or administrative body.

(b) From an order granting a new trial; or refusing to permit an action to be maintained as a class action; or granting or dissolving an injunction; or refusing to grant or dissolve an injunction; or dissolving or refusing to dissolve an attachment; from an order changing or refusing to change the place of trial when the county designated in the complaint is not the proper county; from an order appointing or refusing to appoint a receiver, or giving directions with respect to a receivership, or refusing to vacate an order appointing or affecting a receiver; from an order directing the delivery, transfer, or surrender of property; from any special order made after final judgment; and from such interlocutory judgments or orders, in actions for partition as determine the rights and interests of the respective parties and direct partition to be made. In any of the cases mentioned in this subdivision the supreme court, or a justice thereof, may stay all proceedings under the order appealed from, on such conditions as may seem proper.

(c) From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale, or conveyance of real property, or settling an account of an executor, or administrator, or guardian; or refusing, allowing, directing the distribution or partition of any estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser setting apart a homestead.

All questions raised on an order overruling a motion for a new trial or on an order changing or refusing to change the place of trial under [R.C.M. 1947, section 93-2906, subdivision 4 thereof or] subsection (2) or (3) of section 25-2-201, Montana Code Annotated, may be raised and reviewed on an appeal from the judgment.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 2. What the court may review on an appeal from a judgment.

Upon appeal from a judgment, the court may review the verdict or decision, and any intermediate order or decision excepted or objected to within the meaning of Rule 46 of the Montana Rules of Civil Procedure, which involves the merits, or necessarily affects the judgment, except a decision or order from which an appeal might have been taken.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 3. Suspension of the rules.

In the interest of expediting decision upon any matter before it, or for other good cause shown, the supreme court may, except as otherwise provided in Rule 21(b), suspend the requirements or provisions of these rules on application of a party or on its own motion and may order proceedings in accordance with its direction.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

II. Appeals from Judgments and Orders of District Courts

Rule 4. How taken.

(a) Filing the notice of appeal. An appeal shall be taken by filing a notice of appeal in the district court. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the supreme court deems appropriate, which may include dismissal of the appeal.

(b) Joint appeals. If two or more persons are entitled to appeal from a judgment or order of the district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate notices of appeal as a single appellant.

(c) Content of the notice of appeal. The notice of appeal shall specify the party or parties taking the appeal; and shall designate the judgment or order appealed from. Form 1 in the Appendix of Forms is a suggested form of notice of appeal.

(d) Service of notice of appeal. The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address, and shall mail a copy of the notice of appeal to the clerk of the supreme court. The clerk of the district court shall note on each copy served the date on which the notice of appeal was filed. If an appellant is represented by counsel, his counsel shall provide the clerk with sufficient copies of the notice of appeal to permit the clerk to comply with the requirements of this rule. Failure of the clerk to serve notice shall not affect the validity of the appeal. The notice shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 5. Time for filing notice of appeal.

The time within which an appeal from a judgment or an order must be taken shall be 30 days from the entry thereof, except that in cases where service of notice of entry of judgment is required by Rule 77(d) of the Montana Rules of Civil Procedure the time shall be 30 days from the service of notice of entry of judgment, but if the state of Montana, or any political subdivision thereof, or an officer or agency thereof is a party the notice of appeal shall be filed within 60 days from the entry of the judgment or order or 60 days from the service of notice of the entry of judgment. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 7 days of the date on which the first notice of appeal was filed, or within the time otherwise provided by this rule, whichever period last expires.

The running of the time for filing a notice of appeal is suspended as to all parties by a timely motion filed in the district court by any party pursuant to the Montana Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this rule commences to run and is to be computed from mailing by the clerk of notice of the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59.

Upon showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the original time prescribed by this rule.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 6. Undertaking for costs on appeal.

(a) [Form of undertaking—time for filing]. Within 10 days after service of notice of appeal an undertaking for costs on appeal shall be filed in the district court, or a deposit of the money in the amount thereof be made with the clerk of the district court to abide the event of the appeal, or the undertaking be waived by the adverse party in writing. The undertaking must be executed on the part of the appellant by at least 2 sureties, or by a corporate surety as may be authorized by law, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on the dismissal thereof, not exceeding $500. If the undertaking on appeal is not filed within the time specified, or if the undertaking filed is found insufficient, and if the action is not yet docketed with the supreme court, an undertaking may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file an undertaking may be made only in the supreme court. The undertaking for costs herein provided may be combined in a single document with a supersedeas bond under Rule 7.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 7. Stay of judgment or order pending appeal.

(a) [Stay upon entry of judgment—undertaking]. Upon entry of a judgment or order a party may apply to the district court on notice or ex parte for a stay of the execution of the judgment or order. The court in its discretion may grant said stay for such period of time and under such conditions as the court deems proper, including restraining the party from disposing of, encumbering, or concealing his property. Upon service of notice of appeal, if the court has made no such order or the appellant desires a stay for a longer period than ordered, he may present to the district court and secure its approval of a supersedeas bond which shall have such surety or sureties as are required for an undertaking for costs on appeal prescribed by Rule 6(a). The bond shall be conditioned for the satisfaction of the judgment or order in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment or order is affirmed, and to satisfy in full such modification of the judgment or order and such costs, interest, and damages as the supreme court may adjudge and award. When the judgment or order is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment or order remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the district court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment or order determines the disposition of property in controversy as in real actions, replevin, and actions to foreclose mortgages, or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. On application, the supreme court in the interest of justice may suspend, modify, restore, or grant any order made under this subdivision.

(b) [Sale of perishable property]. If the judgment or order appealed from directs the sale of perishable property, the district court may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the supreme court.

(c) [Cases in which stay of proceedings not allowed]. No stay of proceedings shall be allowed upon a judgment or order which adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding public office, civil or military, within this state; or which grants a writ of mandamus, or of prohibition, against a tribunal, corporation, public officer, or board, commanding certain acts to be done which ought to be done by such tribunal, corporation, public officer, or board, and not involving the payment or allowance of money or its equivalent.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 8. Sureties and their justification.

(a) [Liability of surety—enforcement]. In cases where an undertaking on appeal or supersedeas bond with sureties is required, the provisions of sections 25-1-402, 25-13-105, 33-26-101, 33-26-102, and 72-31-101, Montana Code Annotated, apply. By entering into an undertaking on appeal or supersedeas bond given pursuant to Rules 6 and 7, the surety submits himself to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as his agent upon whom papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of any independent action. The motion and such notice of the motion as the district court prescribed may be served on the clerk of that court, who shall forthwith mail copies to each surety whose address is known.

(b) [Justification of sureties]. A party may except to the sufficiency of the sureties to any bond or undertaking mentioned in this rule at any time within 30 days after the filing of such bond or undertaking; and unless they or other sureties, within 20 days after service of notice of such exception, justify before a judge of the district court, or the clerk thereof, upon 5 days' notice to the other parties of the time and place of justification, execution of the judgment or order appealed from is no longer stayed.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 9. The record on appeal.

(a) Composition of the record on appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) The transcript of proceedings — duty of appellant to order — notice to respondent if partial transcript is ordered — costs of producing. Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. In all cases where the appellant intends to urge insufficiency of the evidence to support the verdict, order or judgment in the district court, it shall be the duty of the appellant to order the entire transcript of the evidence. Wherever the sufficiency of the evidence to support a special verdict or answer by a jury to an interrogatory, or to support a specific finding of fact by the trial court, is to be raised on the appeal by the appellant, he shall be under a duty to include in the transcript all evidence relevant to such verdict, answer or finding. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the respondent a description of the parts of the transcript which he intends to include in the record and a statement of the issues which he intends to present on the appeal. If the respondent deems a transcript of other parts of the proceedings to be necessary he shall within 10 days after such filing and service order such parts from the reporter or procure an order from the district court requiring the appellant to so do.

The cost of producing the transcript shall be paid by the appellant, or he shall make satisfactory arrangements with the reporter for the payment of such cost; but, if the appellant considers that any part of the record designated by the respondent for inclusion is unnecessary for the determination of the issues presented, he shall advise the respondent, and the district court may impose upon the respondent the cost of producing any part which it deems unnecessary for the determination of the issues.

The reporter shall certify the correctness of the transcript.

(c) Statement of the evidence or proceedings when no report was made or when the transcript is unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may, within 10 days from the hearing or trial or such time extended as the district court may for good cause shown permit, prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the respondent, who may serve objections or propose amendments thereto within 10 days after service. Thereupon, the statement and any objections or proposed amendments shall be submitted for settlement and approval to the district judge who handled the proceedings, and as settled and approved shall be included by the clerk of the district court in the record on appeal. A judge may settle and approve such record after he ceases to be a judge. If such judge before the statement is settled and approved dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle and approve the statement, it shall be settled and approved in such manner as the supreme court may direct.

(d) Agreed statement as the record on appeal. In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the supreme court as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 10. Copies of the agreed statement may be filed as the appendix required by Rule 25.

(e) Correction or modification of the record. If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the supreme court, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the supreme court.

(f) Findings of fact and conclusions of law. In all nonjury cases where judgment is rendered on the basis of findings of fact and conclusions of law such findings and conclusions by the district court should be incorporated in the appendix to appellant's brief, along with the district court's opinion, if any.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Rule 10. Transmission of the record.

(a) Time for transmission — number of copies of transcript — duty of appellant. The record on appeal, including the transcript necessary for the determination of the appeal, shall be transmitted to the supreme court within 40 days after the filing of the notice of appeal unless the time is shortened or extended by an order entered under subdivision (c) of this rule. Six copies of each transcript must be lodged with the clerk of this court for filing. Promptly after filing the notice of appeal the appellant shall comply with the provisions of Rule 9(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is filed, each appellant shall comply with the provisions of Rule 9(b) and this subdivision, and a single record shall be transmitted within 40 days after the filing of the final notice of appeal.

(b) Duty of clerk to transmit the record. When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it to the clerk of the supreme court. The clerk shall number the documents comprising the record and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness. Documents in bulky containers and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the supreme court. A party must make advance arrangements with the clerk of the district court for the transportation of bulky or weighty exhibits and with the clerk of the supreme court for their receipt. Transmission of the record is effected when the clerk of the district court mails or otherwise forwards the record to the supreme court. The clerk of the district court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the supreme court.

(c) Extension of time for transmission of the record — reduction of time. The district court may extend the time for transmitting the record. The request for extension must be made within the time originally prescribed or within an extension previously granted, and the district court shall not extend the time to a day more than 90 days from the date of filing of the first notice of appeal. If the district court is without authority to grant the relief sought or has denied a request therefor, the supreme court may on motion extend the time for transmitting the record or may permit the record to be transmitted and filed after the expiration of the time allowed or fixed. A motion for an extension of time for transmitting the record made in either court shall show that the inability of the appellant to cause timely transmission of the record is due to causes beyond his control or to circumstances which may be deemed excusable neglect. If a request for an extension of time for transmitting the record has been previously denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given.

The district court or the supreme court may require the record to be transmitted and the appeal to be docketed at any time within the time otherwise fixed or allowed therefor.

(d) Retention of the record in the district court by order of court. The supreme court may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow and copies of such parts as the parties may designate.

If the record is retained in the district court by order of either court, the clerk of the district court shall retain it subject to the order of the supreme court, and transmission of the copy of the docket entries shall constitute transmission of the record.

(e) Stipulation of parties that parts of the record be retained in the district court. The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the supreme court shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(f) Record for preliminary hearing in the supreme court. If prior to the time the record is transmitted a party desires to make in the supreme court a motion for dismissal, for a stay pending appeal, for additional security on the undertaking on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the supreme court such parts of the original record as the party shall designate.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 11. Docketing the appeal — filing of the record.

(a) Docketing the appeal. Within the time allowed or fixed for transmission of the record, the appellant shall pay to the clerk of the supreme court the fee for filing the record on appeal fixed by sections 3-2-403 and 3-2-404 of the Montana Code Annotated, and the clerk shall thereupon enter the appeal upon the docket. If an appellant is authorized to prosecute the appeal without prepayment of fees, the clerk shall enter the appeal upon the docket at or before the time of filing the record. An appeal shall be docketed under the title given to the action in the district court with such addition as is necessary to indicate the identity of the appellant.

(b) Filing of the record. Upon receipt of the record by the clerk of the supreme court following its timely transmittal, and after the appeal has been timely docketed, the clerk shall file the record. The clerk shall immediately give notice to all parties of the date on which the record was filed.

(c) Dismissal for failure of appellant to cause timely transmission or to docket appeal. If the appellant shall fail to cause timely transmission of the record or to pay the filing fee if a filing fee is required, any respondent may file a motion in the supreme court to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the district court showing the date and substance of the judgment or order from which the appeal was taken, the date on which the notice of appeal was filed, and the expiration date of any order extending the time for transmitting the record; and by proof that 7 days' notice in writing has been served on the appellant that application will be made for dismissal of the appeal. The clerk shall docket the appeal for the purpose of permitting the court to entertain the motion, without requiring payment of the filing fee, but the appellant shall not be permitted to appear without payment of the fees unless he is otherwise exempt therefrom. Instead of filing a motion to dismiss the appeal, the respondent may cause the record to be transmitted and may docket the appeal, in which event the appeal shall proceed as if the appellant had caused it to be docketed.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 12. Effect of dismissal.

The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 13. Acts of executors, administrators or guardians valid when appointment vacated.

When the judgment or order appointing an executor, or administrator, or guardian is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 14. Ruling against respondent may be reviewed.

Whenever the record on appeal shall contain any order, ruling, or proceeding of the trial court against the respondent, affecting his substantial rights on the appeal of said cause, together with any required objection or exception of such respondent, the supreme court on such appeal shall consider such orders, rulings, or proceedings, and the objections and exceptions thereto, and shall reverse or affirm the cause on said appeal according to the substantial rights of the respective parties, as shown upon the record. And no cause shall be reversed upon appeal by reason of any error committed by the trial court against the appellant, where the record shows that the same result would have been attained had such trial court not committed an error or errors against the respondent.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 15. Remedial powers of the supreme court.

When the judgment or order is reversed or modified, the supreme court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on an appeal from which the proceedings were not stayed; and for relief in such cases the appellant may have his action against the respondent, enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 16. Remittitur must be certified to the clerk of the district court.

When judgment is rendered upon the appeal, it must be certified by the clerk of the supreme court to the clerk of the district court from which the appeal is taken. The clerk of the district court must enter at length in the records of the court the certificate received. Also, in cases of appeal from a judgment, the clerk must enter a minute of the judgment of the supreme court on the docket against the original entry; and in cases of appeal from an order, he must enter a minute against the entry of the order appealed from, containing a reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified by the supreme court on appeal.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

III. Original Proceedings — Extraordinary Writs

Rule 17. Acceptance and manner of conducting.

(a) When accepted. The supreme court is an appellate court but it is empowered by the constitution of Montana to hear and determine such original and remedial writs as may be necessary or proper to the complete exercise of its jurisdiction. The institution of such original proceedings in the supreme court is sometimes justified by circumstances of an emergency nature, as when a cause of action or a right has arisen under conditions making due consideration in the trial courts and due appeal to this court an inadequate remedy, or when supervision of a trial court other than by appeal is deemed necessary or proper.

(b) How commenced and conducted. Proceedings commenced in the supreme court originally to obtain writs of habeas corpus, injunction, review, mandate, quo warranto, supervisory control, and other remedial writs or orders, shall be commenced and conducted in the manner prescribed by the Code of Civil Procedure for the conduct of such or analogous proceedings and by these additional rules. All papers filed shall conform to the requirements of Rule 27, except typewritten applications, briefs, copies of exhibits and the like may be used without securing permission of the chief justice as required by Rule 27(a). The provisions of Rule 27(b) shall be observed.

(c) Applications — when filed. The moving party's application shall be filed with the clerk of the supreme court 1 hour prior to its presentation to the court.

(d) Applications — what to contain. The application for the issuance of any of the above writs or orders must set forth, in addition to the other requisite matters, the particular questions and issues anticipated or expected to be raised in the proceeding, and also the fact which renders it necessary and proper that the writ should issue originally from the supreme court; the said matters will be taken into consideration by the court in determining the necessity and propriety of accepting jurisdiction and granting the alternative writ or order to show cause. Each application shall also set forth as exhibits, without repetition of title of court and cause, a copy of each judgment, order, notice, pleading, document, proceeding or court minute referred to in the application, or necessary to make out a prima facie case or to substantiate the pleading or conclusion or legal effect. A memorandum of authorities must be filed with the application. On original applications counsel shall file with the clerk of this court the original court file, with the original application, unless for some reason the same is not available.

(e) Applications — how and when presented. The supreme court will receive and hear original applications in open court on any day when the court is in session; but at least an hour's prior notice of such presentation shall be given by counsel to the chief justice or acting chief justice. Not over 15 minutes shall be allowed for the presentation of any such application unless on prior request further time is granted.

(f) Issuance of alternative writ or order to show cause. This court will, as promptly as possible after the presentation of an application, either dismiss the same, issue an alternative writ, order to show cause, or such other remedial writ or order as it deems expedient.

(g) Briefs. At or before the time set for final hearing, each party shall serve and file his brief in full conformance with Rules 20, 23 and 27, and containing a statement of the facts and of the points of law applicable, with the authorities relied upon.

(h) Hearing — when had. Unless otherwise ordered the hearing shall be had at the time fixed for the return. At or prior to said return time the opposing party shall serve and file, without waiver, any and all pleadings and motions desired to be presented, including answer or return, and all issues shall be argued at the hearing, the applicant opening and closing, and the parties being allowed the same time as upon argument of appeals. If testimony becomes necessary a reference will be ordered.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

IV. Appeals in Forma Pauperis

Rule 18. Applications and manner of proceeding.

(a) Application to district court. A party who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed together with an affidavit showing, in the detail prescribed by Form 2 of the Appendix of Forms, his inability to pay the fees and costs of the appeal or to give security therefor, his belief that he is entitled to redress, and a statement of the issues he intends to present on appeal. If the motion is granted, the party may proceed on appeal without further application to the supreme court and without payment of fees or costs or the giving of security therefor. If the motion is denied, the district court shall state the reasons for the denial.

(b) Application to the supreme court. If the motion for leave to proceed on appeal in forma pauperis is denied by the district court, a motion for leave so to proceed may be filed in the supreme court within 30 days after entry of the order of denial. The motion shall be accompanied by a copy of the affidavit filed in the district court and of the statement of reasons for denial given by the district court.

(c) Form of briefs, appendices and other papers. Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

V. General Provisions

Rule 19. Record of commissions and oaths.

(a) Commissions and oaths. The commissions and oaths of the justices and the clerk of this court, and the attorney general shall be recorded in the records of this court.

(b) Minutes of court. The minutes of this court shall be approved by the chief justice (or in his absence by the associate justice having the shortest term to serve), and attested by the clerk.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 20. Filing and service.

(a) Filing. Papers required or permitted to be filed must be placed in the custody of the clerk within the time fixed for filing. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are actually received within the time fixed for filing. If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with him, in which event he shall note thereon the dates of filing and shall thereafter transmit it to the clerk.

(b) Service of all papers required. Copies of all papers, including any transcript, filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by the party or person acting for him on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

(c) Manner of service. Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(d) Proof of service. Papers presented for filing shall contain acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment of proof of service but shall require such to be filed promptly thereafter.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 21. Computation and extension of time.

(a) Computation of time. In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, Sunday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) Extension of time. The court for good cause shown may upon motion extend the time prescribed by these rules or by its order for doing any act, and may thereby permit an act to be done after the expiration of such time if the failure to act was excusable under the circumstances; but the court may not extend the time for filing a notice of appeal, except as provided in Rule 5.

(c) Additional time after service by mail. Whenever a party is required or permitted to do any act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 22. Motions.

Unless another form is prescribed by these rules, an application for an order or other relief shall be made by filing a motion in writing for such order or relief. The motion shall state with particularity the grounds therefor and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Motions for procedural orders may be determined ex parte. The supreme court may authorize disposition of motions for procedural orders by a single judge. If a motion seeks dismissal of the appeal or other substantial relief, any party may file an answer in opposition within 7 days after service of the motion, or within such time as the court may direct. Motions, supporting papers and any response thereto may be typewritten.

At the time of filing a motion counsel shall present a proposed order, together with sufficient copies for service upon all counsel of record.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 23. Briefs.

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented for review.

(3) A statement of the case. The statement shall first indicate briefly the nature of the case and its disposition in the court below, e.g.: "The plaintiff brought this action in the district court to recover damages for the wrongful death of her husband. The jury returned a verdict for the plaintiff. On motion of the defendant the trial judge entered judgment for the defendant n. o. v. on the ground that there was no evidence to support a finding of negligence on the part of the defendant. From this judgment the plaintiff appeals."

There shall follow a statement of the facts relevant to the issues presented for review, with references to the pages of the parts of the record at which material facts appear (see subdivision (e)).

(4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and pages of the record relied on.

(5) A short conclusion stating the precise relief sought.

(b) Brief of the respondent. The brief of the respondent shall conform to the requirements of subdivision (a) (1) to (4), except that a statement of the issues or of the case need not be made unless the respondent is dissatisfied with the statement of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the respondent. The reply brief must be confined to new matter raised in the brief of the respondent. No further briefs may be filed except with leave of court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such formal designations as "appellant" and "respondent." It promotes clarity to use names or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) References in briefs to the record. Whenever a reference is made in the briefs to the record, the reference must be to particular parts of the record, suitably designated, and to specific pages of each part, e. g., Answer, p. 7; Motion for Summary Judgment, p. 3; Transcript, p. 231. Intelligible abbreviations may be used. If reference is made to an exhibit, reference shall be made to the pages of the transcript on which the exhibit was identified, offered, and received or rejected.

(f) Reproduction of statutes, rules, regulations, etc. If determination of the issues presented requires the study of statutes, rules, regulations, etc., or relevant parts thereof, they may be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form. No such reproduction is required, unless ordered by the supreme court. When the error alleged is to the charge of the court, the brief of the parties shall set out with appropriate transcript references the part referred to totidem verbis, whether it be directed to instructions given or instructions refused.

(g) Length of briefs and costs. Except by permission of the court briefs shall not exceed 50 pages of standard typographic printing or 70 pages of printing by any other process of duplicating or copying, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. For purposes of assessing costs under Montana Code Annotated, section 25-10-104, reasonable costs shall be limited as follows: For appellant's brief 50 pages; for respondent's brief 40 pages; for reply brief 15 pages. In addition, reasonable costs for briefs shall be limited to $250 for appellant's brief and $200 for respondent's brief.

(h) Briefs in cases involving cross appeals. If a cross appeal is filed, the plaintiff in the court below shall be deemed the appellant for the purposes of this rule and Rules 25 and 26, unless the parties otherwise agree or the court otherwise orders. The brief of the respondent shall contain the issues and argument involved in his appeal as well as the answer to the brief of the appellant.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Rule 24. Brief of an amicus curiae.

A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. A motion of an amicus curiae for leave to participate in the oral argument will be granted only for extraordinary reasons.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 25. The appendix to the briefs.

(a) Use of an appendix. At the time before final decision, the supreme court may order an appendix to any brief. Also, either the appellant or respondent may, if he deems it desirable, prepare, file and serve with his brief an appendix.

(b) Contents of the appendix. Unless otherwise ordered by the supreme court, an appendix shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant pleading and relevant portions of the charge, finding and opinion;

(3) the judgment, order or decision in question; and (4) such other parts of the record as any party deems it essential for the judges of the court to read in order to decide the issues presented. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference or examination and shall not engage in unnecessary designation.

(c) Arrangement of the appendix. At the beginning of the appendix there shall appear a chronological list of the parts of the record which it contains. Each part of the record shall be listed by the descriptive title given to that part by the reference made to it in the briefs. The page or pages of the appendix at which each part of the record thus listed appears shall be set out opposite each listing in a column at the right, so as to permit immediate location in the appendix of the parts of the record referred to in the briefs and contained in the appendix.

The relevant docket entries in the proceeding below shall follow the list of contents. Thereafter, the parts of the record shall be set out in chronological order. The original paging of each part of the record set out in the appendix shall be indicated by placing in brackets the number of the original page at the place where that page begins. Omissions in the text of papers or of testimony must be indicated by asterisks. A question and its answer may be contained in a single paragraph.

(d) Reproduction of exhibits. Exhibits may be contained in a separate volume, suitably indexed.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 26. Filing and service of briefs.

(a) Time for filing briefs. The appellant shall serve and file his brief within 30 days after the date on which the record is filed. The respondent shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the respondent, but, except for good cause shown, a reply brief must be served and filed at least 3 days before argument.

(b) Number of copies to be filed and served. Ten copies of each brief shall be filed with the clerk of the supreme court unless otherwise ordered by the court, and one copy of each brief shall be served on counsel for each party separately represented. The clerk will not accept a brief for filing unless it is accompanied by acknowledgment or proof of service as required by Rule 20.

(c) Consequences of failure to file briefs. If an appellant fails to file his brief within the time provided by this rule, or within the time extended, a respondent may move for dismissal of the appeal. If a respondent fails to file his brief, he will not be heard at oral argument except by permission of the court.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 27. Form of briefs, the appendix, motions and other papers.

(a) Form of briefs, appendices and separate volumes of exhibits. Briefs, appendices and separate volumes of exhibits may be produced by standard typographic printing or by any duplicating or copying process capable of producing a clear black image on white paper. Typewritten copies of briefs, appendices and separate volumes of exhibits may not be submitted without permission of the chief justice of the supreme court, except in behalf of parties allowed to proceed in forma pauperis. Pica solid is the smallest letter and the most compact form of composition allowed for all printed matter. Briefs, appendices and separate volumes of exhibits shall be on white uncalendered book paper in book or booklet form. If produced by the standard typographic printing process, the pages shall be 10 inches long and 7 inches wide, with a margin on the outer edge not less than 1 inch wide and on the inner edge not less than 2 inches wide. If produced by a duplicating or copying process, the pages shall be 11 inches long and 8 ½ inches wide, with a margin on the outer edge not less than 1 inch wide and on the inner edge not less than 2 inches wide. The pages shall be fastened at the side and numbered at the top.

(b) Typewritten papers and motions. Papers not required to be produced in a manner prescribed by subdivision (a) of this rule shall be plainly and legibly written by a typewriter with a new black ribbon and new black carbon paper of good grade, in double spacing, except that quotations may be single spaced, on one side only of white typewriter paper, 8 ½ inches wide and 13 inches long, numbered at the bottom, with a ruled margin of 1 ½ inches on the left-hand side of the page and 1 inch on the right-hand side, and numbered lines, not more than 32 lines to the page. The pages shall be bound at the left-hand side into volumes not containing more than 250 pages; provided, however, that if the pages number 50 or less they may be bound at the top.

In collating typewritten papers the copies shall not be mixed, but each copy shall consist throughout of uniform pages. Each page of every copy shall be opaque and each line of print thereon plainly legible. The difficulty of examining transparent, illegible and nonuniform typewritten copies has become so great that this rule will be strictly applied and papers not complying with it will not be received.

(c) First page and cover. All papers shall be bound in cardboard or pasteboard covers, unless bound at the top under subdivision (b) of this rule, in which case they may be bound in cover paper. On the first page and cover of all papers must be stated the title of this court, the title of the case as in the court below, adding to the words "Plaintiff" and "Defendant," the words "Appellant" and "Respondent" as the case may require, the names of counsel for appellant and respondent, the title of the papers, as "Appellant's Brief," "Appendix to Appellant's Brief," etc., and the venue from which the appeal is taken.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 28. Prehearing conference.

The court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceedings by the court. The court or judge shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issue to those not disposed of by admission or agreements of counsel, and such order when entered controls the subsequent course of the proceedings, unless modified to prevent manifest injustice.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 29. Oral argument.

(a) Notice of hearing — postponement. The clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the hearing must be made by motion filed reasonably in advance of the date fixed for hearing.

(b) Time allowed for argument. Upon oral argument of an appeal or original proceeding, 40 minutes will be allowed appellant or applicant and 30 minutes to respondent. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument, he may request such additional time as he deems necessary by motion filed reasonably in advance of the date fixed for hearing. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

(c) Order and content of argument. The appellant or applicant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case, and the closing argument shall be limited to rebuttal of respondent's argument. Counsel will not be permitted to read at length from briefs, records or authorities.

(d) Cross and separate appeals. A cross or separate appeal shall be argued with the initial appeal at a single hearing, unless the court otherwise directs. If a case involves a cross appeal, the plaintiff in the action below shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument at the hearing.

(e) Nonappearance of counsel — failure to file briefs. If counsel for a party fails to appear to present argument, the court may hear argument on behalf of a party whose counsel is present, and the case will be decided on the briefs and the argument heard. If no counsel appear for any party, the case will be decided on the briefs unless the court shall otherwise order.

(f) Submission on briefs. By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(g) Use of physical exhibits at hearing — removal. If physical exhibits other than documents are to be used at the hearing, counsel shall arrange to have them placed in the courtroom before the court convenes on the date of the hearing. After the hearing counsel shall cause the exhibits to be removed from the courtroom unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 30. Entry and notice of orders and judgments.

(a) Entry and notice. The notation of a judgment or order in the docket constitutes entry thereof. Upon entry of a judgment or order, the clerk shall promptly mail to all parties a copy of the judgment or order, and notice of the date of entry thereof.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 31. Interest on judgments.

If a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was rendered or made in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 32. Damages for appeal without merit.

If the supreme court is satisfied from the record and the presentation of the appeal, that the same was taken without substantial or reasonable grounds, but apparently for purposes of delay only, such damages may be assessed on determination thereof as under the circumstances are deemed proper.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 33. Costs.

(a) Costs on appeal. Costs on appeal will be taxed as provided by Montana Code Annotated, section 25-10-104, and if not otherwise provided by the court in its decision, will automatically be awarded to the successful party against the other party. All costs on appeal shall be claimed as provided by section 25-10-503, Montana Code Annotated.

(b) Costs of briefs and appendices. The cost of printing or otherwise producing briefs and appendices shall be taxable at rates not higher than specified in Rule 23(g).

(c) Other costs taxable. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

(d) Costs in original proceedings. Costs in original proceedings, including reviews other than by appeal, will be taxed as provided by Montana Code Annotated, sections 25-10-101, 25-10-102, 25-10-103, and 25-10-105, and if not otherwise provided by the court in its decision, will be awarded to the successful party against the other party; provided, however, that costs awarded to plaintiff or relator in special proceedings to review inferior court rulings, orders or judgments will ordinarily be assessed against the real party in interest, namely, the party interested in upholding the inferior court's action, rather than against the state, county, municipality, subdivision, judge or justice.

(e) Unnecessary costs. Whenever it appears that the successful party has caused any redundant, useless or unnecessary matter to be incorporated in the record, briefs, or appendices, whether on appeal or in a special proceeding, he shall not recover as part of his costs so much of the expense as is occasioned thereby.

(f) Notation by clerk. The clerk of the supreme court shall, in all cases, include in the order of judgment of affirmance, reversal or modification on appeal, or for the issuance of a peremptory writ in an original proceeding, and in the remittitur, peremptory writ or judgment, a clause awarding the costs in accordance with this rule or the special order of this court, to be recovered after claim and ascertainment or taxation thereof in the manner prescribed by law; and the clerk shall also furnish therewith an itemized statement of such costs as have been paid by him.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-8, Sept. 10, 1968, eff. Jan. 1, 1969.

Rule 34. Petitions for rehearing.

When, in appeals or special proceedings, it is ordered that remittitur, peremptory writ or judgment issue forthwith, no petition for rehearing will be entertained. In all other cases a petition for rehearing may be filed within 10 days after the decision of the supreme court has been rendered, unless the time is shortened or enlarged by order, and the adverse party shall have 7 days thereafter in which to serve and file his objections thereto. Extensions of time will be granted only upon showing of unusual merit, and in no event in excess of 10 days. A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not directed. Oral argument in support of the petition will not be permitted. Six copies of the petition and six copies of objections thereto, which may be in typewritten form, shall be filed with the clerk.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 35. Notice and copy of decision — remittitur — mandate from United States supreme court.

(a) Notice and copy of decision to be furnished. Upon the decision of a cause, notice thereof, together with a copy of the court's written decision, will immediately be mailed to counsel for each party.

(b) Remittitur — when issued — when copy of opinion to accompany. Remittitur may, in cases where it is deemed proper, be ordered forthwith; otherwise the same shall be issued promptly upon expiration of time for filing petition for rehearing, or, if such petition is filed, then upon the denial thereof, unless a modification of the decision is made which permits a further petition for rehearing. A copy of the opinion must accompany the remittitur when the judgment or order of the trial court is reversed or modified and the case remanded for further proceedings other than the entry of a final judgment or order terminating the proceedings in the trial court.

(c) Mandate from United States supreme court — procedure thereon. Upon receipt by the clerk of the supreme court of Montana of a mandate from the supreme court of the United States in any case at law or in equity theretofore taken from the supreme court of Montana to the supreme court of the United States, it shall be the duty of said clerk forthwith to issue under his hand and the seal of the supreme court of Montana a remittitur to the district court by which the judgment was rendered, commanding such court to take such action in the premises as by the mandate shall be proper, and said remittitur shall also contain therein a recital in haec verba of the said mandate, and all the costs subsequent to the appeal from said district court shall be taxed in such remittitur.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 36. Voluntary dismissal.

If the parties to an appeal or other proceeding shall sign and file with the clerk an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, and shall give to each party a copy of the agreement filed; but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as to costs as may be agreed upon by the parties or fixed by the court. If an appeal has not been docketed the appeal may be dismissed by the court from which the appeal was taken upon the filing in that court of a stipulation for dismissal signed by all parties, or upon motion and notice by the appellant.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 37. Substitution of parties.

(a) Death of a party. If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the supreme court, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the supreme court. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 20. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the supreme court may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed substitution shall be effected in the supreme court in accordance with this subdivision. If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by his personal representative, or, if he has no personal representative, by his attorney of record within the time prescribed by these rules. After the notice of appeal is filed substitution shall be effected in the supreme court in accordance with this subdivision.

(b) Substitution for other causes. If substitution of a party in the supreme court is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) Public officers — death or separation from office.

(1) When a public officer is a party to an appeal or other proceeding in the supreme court in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer is a party to an appeal or other proceeding he may be described as a party by his official title rather than by name; but the court may require his name to be added.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 38. Cases involving constitutional questions where the state is not a party.

It shall be the duty of counsel who challenges the constitutionality of any act of the Montana legislature in any suit or proceeding in the supreme court to which the state of Montana, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record to give immediate notice in writing to the court of the existence of said question, specifying the section of the code or the chapter of the session law to be construed. The clerk shall thereupon certify such fact to the attorney general of the state of Montana.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 39. Calendar — withdrawal of records.

(a) Placing causes upon calendar. Thirty days after the appellant's brief has been filed, the cause shall be placed on the calendar as ready for oral argument.

(b) Setting causes for argument. As often as found convenient, causes on the calendar will be set for argument by the court in the chronological order in which they have been placed on the calendar, except such causes as are determined entitled to precedence or as otherwise ordered by the court. Oral arguments will not be heard during the months of July and August.

(c) Advancement of causes. Appeals from orders dissolving, refusing to dissolve, granting or refusing to grant writs of injunction, appeals from orders dissolving or refusing to dissolve attachments, appeals from orders appointing or refusing to appoint receivers, appeals from orders or judgments holding appellant in custody, and workmen's compensation appeals, are entitled to precedence and will, upon motion of either party, be advanced on the calendar.

(d) Permission to take record from clerk's office. The records and other papers of the supreme court shall not be taken therefrom except by counsel pursuant to a written order of a justice of the court, which order shall specify the time the same may be retained out of the clerk's office; provided, that the court or a justice thereof may require the same to be returned within a shorter period upon notice. The clerk shall preserve each order and counsel's receipt until the papers therein mentioned shall be returned.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 40. Appeals from injunction orders.

Upon appeal from an order dissolving or refusing an injunction, if the appellant desires to continue in force the injunction order dissolved by the district court, or to obtain such injunction order pending the appeal, he shall apply to the district court under Rule 62 of the Montana Rules of Civil Procedure. In the event the relief there requested be not granted he may file in the supreme court his sworn application, setting forth the proceedings appealed from and the relief desired, and present with it to the supreme court, a verified copy of the affidavits or evidence used on the hearing in the district court. Such application will be heard ex parte and without argument, and the court, upon such record will make such order in the premises as may be proper.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 41. Statutes and rules amended.

[This rule amended Rule 72 of the Montana Rules of Civil Procedure, and Montana Code Annotated, sections 25-9-301, 25-12-101, 25-12-102, 25-33-101, 25-33-205(2), 25-33-206, and 70-30-312. For text of amendments see the designated sections.]

Rule 42. Applicability in general.

(a) Special statutory proceedings. The statutory proceedings listed in Table A of the Montana Rules of Civil Procedure and any other special statutory proceedings, whether or not listed in said Table A, are excepted from these rules insofar as they are inconsistent or in conflict with the procedure and practice provided by these rules.

(b) Appeals to district courts. These rules do not supersede the provisions of statutes relating to appeals to or review by the district courts, which shall govern procedure and practice relating thereto insofar as they are not inconsistent with these rules.

(c) Rules incorporated into statutes. Where any statute heretofore or hereafter enacted, whether or not applicable to a special statutory proceeding or listed in any table appended hereto, provides that any act in a civil proceeding in a district court or in the Montana supreme court shall be done in the manner provided by law or as in a civil action or as provided by any statute superseded by these rules, such act shall be done in accordance with these rules and the procedure thereon shall conform to these rules, insofar as practicable.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 43. Title — effective date — statutes superseded.

(a) Title. These rules shall be known as the Montana Rules of Appellate Civil Procedure and may be cited as M.R.App.Civ.P.

(b) Effective date and application to pending proceedings. These rules will take effect on January 1, 1966. They govern all appeals and original proceedings brought after they take effect, and also all further proceedings in appeals and original proceedings then pending, except to the extent that in the opinion of the supreme court their application in a particular appeal or original proceeding pending when the rules take effect would not be feasible, or would work injustice, in which event the procedure existing at the time the appeal or original proceeding was brought applies.

(c) Statutes and rules superseded. Upon the taking effect of these rules all statutes and rules, and parts thereof, in conflict herewith, and the statutes and rules listed in Tables A, B, and C, insofar as they relate to civil proceedings, are superseded in respect of practice and procedure on appeals from the district courts to the supreme court and in original proceedings brought in the supreme court.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Appendix of Forms

Form 1.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE STATE OF MONTANA FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

IN THE DISTRICT COURT OF THE .... JUDICIAL DISTRICT
OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF ....

A.B.	Plaintiff	
vs.		Notice of Appeal
C.D.	Defendant	

Notice is hereby given that C.D., defendant above-named, hereby appeals to the supreme court of the state of Montana (from the final judgment) (from the order (describing it)) entered in this action on the .... day of ...., 19...

(S) ....

....

Attorney for C.D. (Address)

Form 2.

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

IN THE DISTRICT COURT OF THE .... JUDICIAL DISTRICT
OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF ....

A.B.	Plaintiff	AFFIDAVIT IN SUPPORT OF APPLICATION
vs.		TO PROCEED ON APPEAL WITHOUT
C.D.	Defendant	PREPAYMENT OF COSTS

I, ..., being first duly sworn, depose and say that I am the .... in the above-entitled case; that in support of my application to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

....

....

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past 12 months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source of income, and state the amount received from each during the past 12 months.

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

....

Subscribed and Sworn to before
me this .... day of ....,
19...

....
Notary Public

Let the applicant proceed without
prepayment of costs.

....
District Judge

CHAPTERS 22 THROUGH 29

RESERVED

CHAPTER 30

PROCEDURE IN MUNICIPAL COURTS

Part 1 — General Provisions

Section
25-30-101. Applicability of district court and justice's court rules.
25-30-102. Fees and fines.
25-30-103. Summons — time for answer.
25-30-104. Reply to counterclaim or new matter.
25-30-105. Jury trial.
25-30-106. Judgments.
25-30-107. Costs.
25-30-108. Appeals.

Part 1

General Provisions

25-30-101. Applicability of district court and justice's court rules. (1) The provisions of 3-10-222, 3-10-231 through 3-10-234, 3-10-305, 3-10-306, 3-10-704 through 3-10-706, 25-31-111, 25-31-114 through 25-31-116, 25-31-304, 25-31-402(2), 25-31-405, parts 7 through 11 of chapter 31 of this title (except 25-31-701, 25-31-915, 25-31-1002, 25-31-1004, and 25-31-1005), chapter 33 of this title, chapter 9, part 10 of chapter 16, and part 1 of chapter 17 of Title 27, 27-17-401, and part 15 of chapter 18 of Title 27 are applicable to municipal courts except when they are inconsistent with the provisions of this chapter and chapter 6 of Title 3, the words "municipal court" being substituted for justice's court and "judge" for justice of the peace.

(2) Except as otherwise provided by this chapter and chapter 6 of Title 3, the proceedings and practice in municipal court shall be the same as in district court.

History: (1)En. Sec. 11, Ch. 177, L. 1935; re-en. Sec. 5094.11, R.C.M. 1935; amd. Sec. 9, Ch. 344, L. 1977; amd. Sec. 8, Ch. 429, L. 1977; Sec. 11-1711, R.C.M. 1947; (2)En. Sec. 20, Ch. 177, L. 1935; re-en. Sec. 5094.19, R.C.M. 1935; Sec. 11-1719, R.C.M. 1947; R.C.M. 1947, 11-1711(1), 11-1719(part).

25-30-102. Fees and fines. The fees and fines in municipal court shall be the same as the fees and fines provided by law or ordinance, and all fees and fines collected by the court shall be paid into the city treasury.

History: En. Sec. 18, Ch. 177, L. 1935; re-en. Sec. 5094.18, R.C.M. 1935; amd. Sec. 10, Ch. 429, L. 1977; R.C.M. 1947, 11-1718.

25-30-103. Summons — time for answer. The summons in municipal court shall be signed by the clerk and shall conform to the provisions of M.R.Civ.P., Rules 4 and 12(a), except that the time for answering is 10 days.

History: En. Sec. 10, Ch. 177, L. 1935; re-en. Sec. 5094.10, R.C.M. 1935; amd. Sec. 8, Ch. 344, L. 1977; amd. Sec. 7, Ch. 429, L. 1977; R.C.M. 1947, 11-1710.

25-30-104. Reply to counterclaim or new matter. Whenever the answer contains a counterclaim or any new matter, the plaintiff shall within 5 days after the service and filing of the answer reply to the counterclaim or new matter in the manner and form provided for in M.R.Civ.P., Rules 7(a), 8(e)(2), and 10(b).

History: En. Sec. 11, Ch. 177, L. 1935; re-en. Sec. 5094.11, R.C.M. 1935; amd. Sec. 9, Ch. 344, L. 1977; amd. Sec. 8, Ch. 429, L. 1977; R.C.M. 1947, 11-1711(2).

25-30-105. Jury trial. In civil causes arising under the state law, either party shall be entitled to a jury trial, as provided in justices' courts, except that the police officer shall perform the duties thereto prescribed to the sheriff or constable.

History: En. Sec. 15, Ch. 177, L. 1935; re-en. Sec. 5094.15, R.C.M. 1935; R.C.M. 1947, 11-1715(part).

25-30-106. Judgments. In civil causes, judgments in municipal court shall be made and entered as in district court and shall be of like tenor and effect.

History: En. Sec. 12, Ch. 177, L. 1935; re-en. Sec. 5094.12, R.C.M. 1935; R.C.M. 1947, 11-1712.

25-30-107. Costs. The same costs shall be allowed as are allowed in justices' courts and shall be taxed and retaxed as in district court, 24 hours being allowed for filing memorandum of costs.

History: En. Sec. 14, Ch. 177, L. 1935; re-en. Sec. 5094.14, R.C.M. 1935; R.C.M. 1947, 11-1714.

25-30-108. Appeals. (1) A party may appeal to district court from a judgment of municipal court.

(2) Appeal from a municipal court may be limited by requiring by ordinance that a minimum amount in controversy, not to exceed $200, be met before the district court has jurisdiction to hear the appeal, except upon petition by an aggrieved party, the district court may, in the interests of justice, accept appeal jurisdiction notwithstanding the amount in controversy.

History: En. Sec. 17, Ch. 177, L. 1935; re-en. Sec. 5094.17, R.C.M. 1935; amd. Sec. 9, Ch. 429, L. 1977; R.C.M. 1947, 11-1717(part).

CHAPTER 31

PROCEDURE IN JUSTICES' COURTS

Part 1 — General Provisions

Section
25-31-101. Issues which cannot be presented in justice's court.
25-31-102. Transfer to district court.
Sections 25-31-103 through 25-31-110 reserved.
25-31-111. What provisions of code applicable to justices' courts.
25-31-112. Fees.
25-31-113. When fees payable.
25-31-114. Depositions.
25-31-115. Deposit of money in lieu of undertaking.
25-31-116. Offer to compromise before trial.

Part 2 — Venue

25-31-201. Venue generally.
25-31-202. Actions based on a contract or other obligation.
25-31-203. Actions for damages for injury to person, property, or reputation.
25-31-204. Actions for the taking of or to recover personal property.
25-31-205. Actions for forcible entry or unlawful detainer.

Part 3 — Change of Venue

25-31-301. When change of venue permitted.
25-31-302. Contents of affidavits.
25-31-303. Limit on number of changes.
25-31-304. When improper venue basis for appeal.
25-31-305. Where action to be transferred.
25-31-306. Papers to be transmitted.
25-31-307. Jurisdiction of transferee court.
25-31-308. Notice of the time and place of trial — pleading.

Part 4 — Commencement of Action—Summons

25-31-401. How action commenced — complaint.
25-31-402. Time for issuing summons — security for costs.
25-31-403. Waiver of summons by defendant.
25-31-404. Form and content of summons.
25-31-405. Designating unknown person as defendant.
25-31-406. Time for answer or appearance.
25-31-407. Where summons may be served.
25-31-408. Who may serve summons — method of service, return.
25-31-409. Alias summons.

Part 5 — Pleadings

25-31-501. Form of pleadings.
25-31-502. Permissible pleadings.
25-31-503. Demurrers abolished.
25-31-504. Complaint.
25-31-505. Answer.
25-31-506. Compulsory counterclaim.
25-31-507. Denial of new matter.
Sections 25-31-508 through 25-31-510 reserved.
25-31-511. Pleading an account or instrument.
25-31-512. Admission of genuineness of signatures.
Sections 25-31-513 through 25-31-520 reserved.

25-31-521. Amendment of pleadings.
25-31-522. Answer to amended pleading.
25-31-523. Variance.

Part 6 — Parties

25-31-601. Who may act as attorney.
25-31-602. When guardian necessary — how appointed.

Part 7 — Time of Trial—Postponements

25-31-701. Fixing day of trial — notice.
25-31-702. Trial to be timely.
25-31-703. Postponement by motion of court.
25-31-704. Postponement by consent of parties.
25-31-705. Postponement upon application of a party — proof required.
25-31-706. No postponement when expected evidence admitted.
25-31-707. Procedure when defendant under arrest.
25-31-708. Deposition of witnesses upon postponement.
25-31-709. Time limit on adjournment — undertaking.

Part 8 — Trial

25-31-801. Issue defined, types of issues.
25-31-802. How issues of fact arise.
25-31-803. By whom issues tried.
25-31-804. Waiver of jury trial.
Sections 25-31-805 through 25-31-810 reserved.
25-31-811. Trial after nonappearance of a party.
25-31-812. Challenges to jurors.

Part 9 — Judgment

25-31-901. Procedure upon default.
25-31-902. Cases treated as a default.
25-31-903. Judgment of dismissal without prejudice.
25-31-904. Entry of judgment.
25-31-905. Judgment when only part of defendants served.
25-31-906. Judgment when amount found due exceeds the jurisdiction of the court.
25-31-907. Judgment when counterclaim has been established.
25-31-908. Judgment when defendant subject to arrest.
Sections 25-31-909 and 25-31-910 reserved.
25-31-911. Abstract of judgment.
25-31-912. Filing and docketing of judgment in district court.
25-31-913. Issuance of execution by clerk of district court.
25-31-914. Lien on real property.
25-31-915. Relief from judgment.

Part 10 — Costs

25-31-1001. Who entitled to costs.
25-31-1002. How costs taxed.
25-31-1003. Costs to be included in judgment.
25-31-1004. Jurors' fees.
25-31-1005. Costs of transferring papers — change of venue.

Part 11 — Execution of Judgment

25-31-1101. When justice may issue execution.
25-31-1102. Form and content of execution.
25-31-1103. Renewal and reissuance of execution.
25-31-1104. Manner of execution.

25-31-1105. Proceedings in aid of execution.
25-31-1106. Discharge of imprisoned judgment debtor.
Sections 25-31-1107 through 25-31-1110 reserved.
25-31-1111. Collection of judgment against county or county officer.

Part 1

General Provisions

25-31-101. Issues which cannot be presented in justice's court. The parties to an action in a justice's court cannot give evidence upon any question which involves the title or possession of real property or the legality of any tax, impost, assessment, toll, or municipal fine, nor can any issue presenting such question be tried by such court; provided that, in cases of forcible entry and unlawful detainer of which justices' courts have jurisdiction, any evidence otherwise competent may be given, and any question properly involved therein may be determined.

History: En. Sec. 593, Bannack Stat.; re-en. Sec. 699, p. 176, Cod. Stat. 1871; re-en. Sec. 759, 1st Div. Rev. Stat. 1879; re-en. Sec. 779, 1st Div. Comp. Stat. 1887; en. Sec. 1486, C. Civ. Proc. 1895; re-en. Sec. 6992, Rev. C. 1907; re-en. Sec. 9625, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 838; re-en. Sec. 9625, R.C.M. 1935; R.C.M. 1947, 93-6607(part).

25-31-102. Transfer to district court. If it appear from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property or the legality of any tax, impost, assessment, toll, or municipal fine, the justice must suspend all further proceedings in the action and certify the pleadings and, if any of the pleadings are oral, a transcript of the same from his docket to the clerk of the district court of the county; and from the time of filing such pleadings or transcript with the clerk, the district court shall have over the action the same jurisdiction as if it had been commenced therein. When the action is certified to the district court, upon the answer of the defendant, he must file an undertaking, to be approved by the justice, to the effect that he will pay all costs that may be awarded against him on the trial in the district court.

History: En. Sec. 593, Bannack Stat.; re-en. Sec. 699, p. 176, Cod. Stat. 1871; re-en. Sec. 759, 1st Div. Rev. Stat. 1879; re-en. Sec. 779, 1st Div. Comp. Stat. 1887; en. Sec. 1486, C. Civ. Proc. 1895; re-en. Sec. 6992, Rev. C. 1907; re-en. Sec. 9625, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 838; re-en. Sec. 9625, R.C.M. 1935; R.C.M. 1947, 93-6607(part).

25-31-103 through 25-31-110 reserved.

25-31-111. What provisions of code applicable to justices' courts. Because justices' courts are courts of peculiar and limited jurisdiction, only those provisions of this code which are, in their nature, applicable to the organization, powers, and course of proceedings in justices' courts or which have been made applicable by special provisions in this chapter, chapter 10 of Title 3, 27-9-101, 27-17-102, 27-17-401, and part 10 of chapter 16 and part 15 of chapter 18 of Title 27 are applicable to justices' courts and the proceedings therein.

History: En. Sec. 1686, C. Civ. Proc. 1895; re-en. Sec. 7084, Rev. C. 1907; re-en. Sec. 9717, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 925; re-en. Sec. 9717, R.C.M. 1935; amd. Sec. 52, Ch. 344, L. 1977; R.C.M. 1947, 93-7707.

25-31-112. Fees. The following is the schedule of fees which shall be paid in every civil action in a justice's court:

(1) $5 when complaint is filed, to be paid by the plaintiff;

(2) $5 when the defendant appears, to be paid by the defendant;

(3) $5 to be paid by the prevailing party when judgment is rendered. In cases where judgment is entered by default, no charge except the $5 for the filing of the complaint shall be made for any services, including issuing and return of execution.

(4) $5 for all services in an action where judgment is rendered by confession;

(5) $5 for filing notice of appeal and transcript on appeal, justifying and approving undertaking on appeal, and transmitting papers to the district court with certificate.

History: En. Sec. 4642, Pol. C. 1895; and as Sec. 1, Ch. 52, L. 1903; re-en. Secs. 3175-3176, Rev. C. 1907; superseded by Sec. 1, Ch. 55, L. 1921; re-en. Sec. 4924, R.C.M. 1921; re-en. Sec. 4924, R.C.M. 1935; amd. Sec. 1, Ch. 184, L. 1963; amd. Sec. 3, Ch. 420, L. 1975; amd. Sec. 1, Ch. 154, L. 1977; R.C.M. 1947, 25-301.

25-31-113. When fees payable. All fees must be paid in advance, and no costs shall be included in any judgment until they have been paid. However, nothing herein contained shall restrict or prevent the bringing of suits in forma pauperis as provided by law.

History: En. Sec. 4642, Pol. C. 1895; and as Sec. 1, Ch. 52, L. 1903; re-en. Secs. 3175-3176, Rev. C. 1907; superseded by Sec. 2, Ch. 55, L. 1921; re-en. Sec. 4925, R.C.M. 1921; re-en. Sec. 4925, R.C.M. 1935; R.C.M. 1947, 25-302.

25-31-114. Depositions. Depositions to be used in justices' courts shall be taken as provided in Rules 26 and 28 to 32, inclusive, of the Montana Rules of Civil Procedure.

History: En. Sec. 1691, C. Civ. Proc. 1895; re-en. Sec. 7089, Rev. C. 1907; re-en. Sec. 9722, R.C.M. 1921; re-en. Sec. 9722, R.C.M. 1935; amd. Sec. 1, Ch. 167, L. 1967; R.C.M. 1947, 93-7712.

25-31-115. Deposit of money in lieu of undertaking. In civil cases arising in justices' courts wherein an undertaking is required as prescribed in this code, the plaintiff or defendant may deposit with said justice a sum of money equal to the amount required by said undertaking, which said sum of money shall be taken as security in place of said undertaking.

History: En. Sec. 1687, C. Civ. Proc. 1895; re-en. Sec. 7085, Rev. C. 1907; re-en. Sec. 9718, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 926; re-en. Sec. 9718, R.C.M. 1935; R.C.M. 1947, 93-7708.

25-31-116. Offer to compromise before trial. If the defendant, at any time before the trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial and fail to recover in the action a sum in excess of the offer, he cannot recover costs, but costs must be adjudged against him and, if he recover, be deducted from his recovery. The offer and failure to accept cannot be given in evidence or affect the recovery otherwise than as to costs.

History: En. Sec. 611, p. 164, Bannack Stat.; re-en. Sec. 717, p. 180, Cod. Stat. 1871; re-en. Sec. 777, 1st Div. Rev. Stat. 1879; re-en. Sec. 797, 1st Div. Comp. Stat. 1887; amd. Sec. 1628, C. Civ. Proc. 1895; re-en. Sec. 7054, Rev. C. 1907; re-en. Sec. 9687, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 895; re-en. Sec. 9687, R.C.M. 1935; R.C.M. 1947, 93-7309.

Part 2

Venue

25-31-201. Venue generally. Actions in justices' courts may be commenced and, subject to the right to change the place of trial, as provided in part 3 of this chapter, may be tried:

(1) when the defendant is a nonresident of the county, in any county where he may be found and served with summons personally;

(2) when the defendant is a nonresident of the state, in any county of the state;

(3) when the parties voluntarily appear and plead without summons, in any county of the state;

(4) in all other cases, in any county in which the defendant or any one of the defendants, if there be more than one, resides or may be found and served with summons personally.

History: En. Sec. 1480, C. Civ. Proc. 1895; amd. Sec. 1, p. 148, L. 1899; re-en. Sec. 6986, Rev. C. 1907; re-en. Sec. 9619, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 832; re-en. Sec. 9619, R.C.M. 1935; amd. Sec. 15, Ch. 491, L. 1973; R.C.M. 1947, 93-6601(part).

25-31-202. Actions based on a contract or other obligation. When the defendant or all of the defendants, if there be more than one, reside in another county than that in which the right of action accrues and the action be for damages for violation of an express or implied contract or for money due on an express or implied contract, debt, note, or account, the action may be commenced and, subject to the right to change the place of trial, as provided in part 3 of this chapter, may be tried in the county in which such contract or obligation is to be or was to have been performed or such money is to be or was to have been paid or in which the defendant or any one of the defendants resides; and the county in which the obligation is incurred shall be deemed to be the county in which it is to be performed or paid unless there is a special contract to the contrary.

History: En. Sec. 1480, C. Civ. Proc. 1895; amd. Sec. 1, p. 148, L. 1899; re-en. Sec. 6986, Rev. C. 1907; re-en. Sec. 9619, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 832; re-en. Sec. 9619, R.C.M. 1935; amd. Sec. 15, Ch. 491, L. 1973; R.C.M. 1947, 93-6601(part).

25-31-203. Actions for damages for injury to person, property, or reputation. When the defendant or all of the defendants, if there be more than one, reside in another county than that in which the right of action accrues and the action be for damages for injury to person, property, or reputation, the action may be commenced and, subject to the right to change the place of trial, as provided in part 3 of this chapter, may be tried in the county where the injury was committed or in which the defendant or any one of the defendants resides.

History: En. Sec. 1480, C. Civ. Proc. 1895; amd. Sec. 1, p. 148, L. 1899; re-en. Sec. 6986, Rev. C. 1907; re-en. Sec. 9619, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 832; re-en. Sec. 9619, R.C.M. 1935; amd. Sec. 15, Ch. 491, L. 1973; R.C.M. 1947, 93-6601(part).

25-31-204. Actions for the taking of or to recover personal property. In justice's court when the defendant or all the defendants, if there be more than one, reside in another county than that in which the right of action accrues and the action be for the recovery of personal property or the value thereof or damages for taking or detaining the same, the action may be commenced and, subject to the right to change the place of trial, as provided in part 3 of this chapter, may be tried in the county in which the property or any part thereof may be found, in which the property or any part thereof was taken, or in which the defendant or any one of the defendants resides.

History: En. Sec. 1480, C. Civ. Proc. 1895; amd. Sec. 1, p. 148, L. 1899; re-en. Sec. 6986, Rev. C. 1907; re-en. Sec. 9619, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 832; re-en. Sec. 9619, R.C.M. 1935; amd. Sec. 15, Ch. 491, L. 1973; R.C.M. 1947, 93-6601(part).

25-31-205. Actions for forcible entry or unlawful detainer. All actions for the recovery of the possession of real property must be commenced in the county in which the real property, or any part thereof, affected by such action or actions is situated.

History: En. Sec. 43, C. Civ. Proc. 1895; re-en. Sec. 6277, Rev. C. 1907; re-en. Sec. 8831, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 78; R.C.M. 1947, 93-320(part).

Part 3

Change of Venue

25-31-301. When change of venue permitted. The court may, at any time before trial, on motion, change the place of trial in the following cases:

(1) when it appears to the satisfaction of the justice before whom the action is pending, by affidavit of either party, that such justice is a material witness for either party;

(2) when a jury has been demanded and either party makes and files an affidavit that he cannot have a fair and impartial trial on account of the bias or prejudice of the citizens of the county, town, or city against him;

(3) when, from any cause, the justice is disqualified from acting;

(4) when the justice is sick or unable to act.

History: En. Sec. 594, p. 160, Bannack Stat.; re-en. Sec. 700, p. 176, Cod. Stat. 1871; re-en. Sec. 760, 1st Div. Rev. Stat. 1879; re-en. Sec. 780, 1st Div. Comp. Stat. 1887; en. Sec. 1481, C. Civ. Proc. 1895; re-en. Sec. 6987, Rev. C. 1907; re-en. Sec. 9620, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 833; re-en. Sec. 9620, R.C.M. 1935; amd. Sec. 16, Ch. 491, L. 1973; (2)superseded by Sup. Ct. Ord., 34 St. Rep. 26, Dec. 29, 1976; R.C.M. 1947, 93-6602.

25-31-302. Contents of affidavits. The affidavit mentioned in subsections (1) and (2) of 25-31-301 must state the facts.

History: En. Sec. 1482, C. Civ. Proc. 1895; re-en. Sec. 6988, Rev. C. 1907; amd. Sec. 1, Ch. 37, L. 1921; re-en. Sec. 9621, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 834; re-en. Sec. 9621, R.C.M. 1935; R.C.M. 1947, 93-6603(part).

25-31-303. Limit on number of changes. The place of trial cannot be changed on motion of the same party more than once upon any or all the grounds specified in subsections (1) and (2) of 25-31-301.

History: En. Sec. 1482, C. Civ. Proc. 1895; re-en. Sec. 6988, Rev. C. 1907; amd. Sec. 1, Ch. 37, L. 1921; re-en. Sec. 9621, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 834; re-en. Sec. 9621, R.C.M. 1935; R.C.M. 1947, 93-6603(part).

25-31-304. When improper venue basis for appeal. If the objection that the action is brought in the wrong county is taken and overruled, it is the cause of a reversal on appeal and does not otherwise invalidate the judgment; if not taken at the trial, it is waived.

History: En. Sec. 605, p. 163, Bannack Stat.; re-en. Sec. 711, p. 179, Cod. Stat. 1871; re-en. Sec. 771, 1st Div. Rev. Stat. 1879; re-en. Sec. 791, 1st Div. Comp.

Stat. 1887; amd. Sec. 1621, C. Civ. Proc. 1895; re-en. Sec. 7047, Rev. C. 1907; re-en. Sec. 9680, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 890; re-en. Sec. 9680, R.C.M. 1935; amd. Sec. 2, Ch. 34, L. 1937; amd. Sec. 19, Ch. 491, L. 1973; R.C.M. 1947, 93-7302(part).

25-31-305. Where action to be transferred. When the court orders the place of trial to be changed, the action must be transferred for trial to a court the parties may agree upon and, if they do not so agree, to another justice's court in the same county.

History: En. Sec. 1483, C. Civ. Proc. 1895; re-en. Sec. 6989, Rev. C. 1907; re-en. Sec. 9622, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 835; re-en. Sec. 9622, R.C.M. 1935; R.C.M. 1947, 93-6604.

25-31-306. Papers to be transmitted. After an order has been made transferring the action or proceeding to another court for trial, the justice ordering the transfer must immediately transmit to the justice of the court to which it is transferred, on payment by the party applying of all the costs that have accrued, the pleading and all the papers in the action, together with a certified transcript from his docket of the proceedings therein.

History: Ap. p. Sec. 1484, C. Civ. Proc. 1895; re-en. Sec. 6990, Rev. C. 1907; re-en. Sec. 9623, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 836; re-en. Sec. 9623, R.C.M. 1935; Sec. 93-6605, R.C.M. 1947; Ap. p. Sec. 64, p. 53, L. 1877; re-en. Sec. 64, 1st Div. Rev. Stat. 1879; re-en. Sec. 64, 1st Div. Comp. Stat. 1887; re-en. Sec. 617, C. Civ. Proc. 1895; re-en. Sec. 6508, Rev. C. 1907; re-en. Sec. 9100, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 399; re-en. Sec. 9100, R.C.M. 1935; amd. Sec. 1, Ch. 176, L. 1971; Sec. 93-2908, R.C.M. 1947; R.C.M. 1947, 93-2908(part), 93-6605(part).

25-31-307. Jurisdiction of transferee court. From the time the order changing the place of trial is made, the court to which the action or proceeding is thereby transferred has and exercises the same jurisdiction over it as though it had been originally commenced in such court.

History: Ap. p. Sec. 1485, C. Civ. Proc. 1895; re-en. Sec. 6991, Rev. C. 1907; re-en. Sec. 9624, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 837; re-en. Sec. 9624, R.C.M. 1935; Sec. 93-6606, R.C.M. 1947; Ap. p. Sec. 64, p. 53, L. 1877; re-en. Sec. 64, 1st Div. Rev. Stat. 1879; re-en. Sec. 64, 1st Div. Comp. Stat. 1887; re-en. Sec. 617, C. Civ. Proc. 1895; re-en. Sec. 6508, Rev. C. 1907; re-en. Sec. 9100, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 399; re-en. Sec. 9100, R.C.M. 1935; amd. Sec. 1, Ch. 176, L. 1971; Sec. 93-2908, R.C.M. 1947; R.C.M. 1947, 93-2908(part), 93-6606.

25-31-308. Notice of the time and place of trial — pleading. Upon the receipt by him of such papers, the justice of the court to which the case is transferred must issue a notice stating when and where the trial will take place, which notice must be served upon the parties at least a day before the time fixed for trial. If no answer or demurrer has been made by the defendant, he must be allowed to plead.

History: En. Sec. 1484, C. Civ. Proc. 1895; re-en. Sec. 6990, Rev. C. 1907; re-en. Sec. 9623, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 836; re-en. Sec. 9623, R.C.M. 1935; R.C.M. 1947, 93-6605(2).

Part 4

Commencement of Action — Summons

25-31-401. How action commenced — complaint. An action in a justice's court is commenced by filing a copy of the account, note, bill, bond, or instrument upon which the action is brought, with a statement of the amount due thereon or a concise statement in writing of the cause of action, either of which is deemed a complaint.

History: En. Sec. 554, p. 151, Bannack Stat.; re-en. Sec. 660, p. 168, Cod. Stat. 1871; re-en. Sec. 720, 1st Div. Rev. Stat. 1879; re-en. Sec. 740, 1st Div. Comp. Stat. 1887; en. Sec. 1500, C. Civ. Proc. 1895; re-en. Sec. 6993, Rev. C. 1907; re-en. Sec. 9626, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 839; re-en. Sec. 9626, R.C.M. 1935; R.C.M. 1947, 93-6701.

25-31-402. Time for issuing summons — security for costs. (1) The court must endorse on the complaint the date upon which it was filed, and at any time within 1 year thereafter the plaintiff may have summons issued.

(2) Justices may, in all cases, require a deposit of money or an undertaking as security for costs of court before issuing a summons.

History: (1)En. Sec. 1501, C. Civ. Proc. 1895; re-en. Sec. 6994, Rev. C. 1907; re-en. Sec. 9627, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 840; re-en. Sec. 9627, R.C.M. 1935; Sec. 93-6702, R.C.M. 1947; (2)En. Sec. 645, p. 171, Bannack Stat.; re-en. Sec. 750, p. 187, Cod. Stat. 1871; re-en. Sec. 810, 1st Div. Rev. Stat. 1879; re-en. Sec. 830, 1st Div. Comp. Stat. 1887; re-en. Sec. 1684, C. Civ. Proc. 1895; re-en. Sec. 7082, Rev. C. 1907; re-en. Sec. 9715, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 923; re-en. Sec. 9715, R.C.M. 1935; Sec. 93-7705, R.C.M. 1947; R.C.M. 1947, 93-6702, 93-7705.

25-31-403. Waiver of summons by defendant. At any time after the complaint is filed, the defendant may, in writing or by appearing and pleading, waive the issuing of summons.

History: En. Sec. 1502, C. Civ. Proc. 1895; re-en. Sec. 6995, Rev. C. 1907; re-en. Sec. 9628, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 841; re-en. Sec. 9628, R.C.M. 1935; R.C.M. 1947, 93-6703.

25-31-404. Form and content of summons. The summons must be directed to the defendant and signed by the justice and must contain:

(1) the title of the court, the name of the county and city in which the action is commenced, and the names of the parties thereto;

(2) a sufficient statement of the cause of action, in general terms, to apprise the defendant of the nature of the claim against him, but a copy of the complaint in the action, when served with the copy of the summons upon defendant in lieu of said statement, is sufficient;

(3) a direction that the defendant appear and answer before the justice at his office, as specified in 25-31-406, and that if he fail to appear and answer, judgment will be taken against him according to the complaint.

History: En. Sec. 556, p. 152, Bannack Stat.; re-en. Sec. 662, p. 169, Cod. Stat. 1871; re-en. Sec. 722, 1st Div. Rev. Stat. 1879; re-en. Sec. 742, 1st Div. Comp. Stat. 1887; En. Sec. 1505, C. Civ. Proc. 1895; re-en. Sec. 6998, Rev. C. 1907; re-en. Sec. 9631, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 844; re-en. Sec. 9631, R.C.M. 1935; amd. Sec. 1, Ch. 91, L. 1939; amd. Sec. 17, Ch. 491, L. 1973; R.C.M. 1947, 93-6706.

25-31-405. Designating unknown person as defendant. Where the plaintiff is ignorant of the name or part of the name of a defendant, that defendant may be designated in the summons and in any other process or proceeding in the action by a fictitious name or by so much of his name as is known, adding a description identifying the person intended. The person so designated must thereupon be regarded as a defendant in the action and as sufficiently described therein for all purposes. When his name or the remainder of his name is known or becomes known, the justice before whom the action is pending must amend the proceedings already taken by the insertion of the true or full name in place of the fictitious name or part of a name, and all subsequent proceedings must be taken under the name so inserted.

History: En. Sec. 1692, C. Civ. Proc. 1895; re-en. Sec. 7090, Rev. C. 1907; re-en. Sec. 9723, R.C.M. 1921; re-en. Sec. 9723, R.C.M. 1935; R.C.M. 1947, 93-7713.

25-31-406. Time for answer or appearance. The time specified in the summons for the appearance of the defendant must be as follows:

(1) if an order of arrest be endorsed upon the summons, forthwith;

(2) in all other cases, the summons shall provide that the defendant shall answer and, if such answer be in writing, file the same and serve a copy thereof upon the plaintiff or his attorney within 6 days after service of this summons, exclusive of the day of service, and in case of his failure to appear or answer, judgment will be taken against him by default for the relief demanded in the complaint.

History: En. Sec. 557, p. 152, Bannack Stat.; re-en. Sec. 663, p. 169, Cod. Stat. 1871; re-en. Sec. 723, 1st Div. Rev. Stat. 1879; re-en. Sec. 743, 1st Div. Comp. Stat. 1887; amd. Sec. 1506, C. Civ. Proc. 1895; re-en. Sec. 6999, Rev. C. 1907; re-en. Sec. 9632, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 845; re-en. Sec. 9632, R.C.M. 1935; amd. Sec. 3, Ch. 34, L. 1937; amd. Sec. 1, Ch. 196, L. 1939; R.C.M. 1947, 93-6707.

25-31-407. Where summons may be served. (1) The summons cannot be served out of the county of the justice before whom the action is brought, except:

(a) when the action is brought upon a joint contract or obligation of two or more persons who reside in different counties and the summons has been served upon the defendant resident of the county, in which case the summons may be served upon the other defendant out of the county;

(b) when an action is brought against a party who has contracted to perform an obligation at a particular place and resides in a different county, in which case summons may be served in the county where he resides; and

(c) where an action is brought for an injury to person or property and the defendant resides in a different county, in which case summons may be served in the county where defendant resides.

(2) When a summons issued by a justice of the peace is to be served out of the county in which it was issued, the summons shall have attached to it a certificate, under seal by the county clerk of the county in which it was issued, to the effect that the person issuing the same was an acting justice of the peace at the date of the summons.

History: (1)En. Sec. 1509, C. Civ. Proc. 1895; re-en. Sec. 7002, Rev. C. 1907; re-en. Sec. 9635, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 848; re-en. Sec. 9635, R.C.M. 1935; Sec. 93-6710, R.C.M. 1947; (2)En. Sec. 1510, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 61, L. 1903; re-en. Sec. 7003, Rev. C. 1907; re-en. Sec. 9636, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 849; re-en. Sec. 9636, R.C.M. 1935; amd. Sec. 1, Ch. 110, L. 1967; amd. Sec. 57, Ch. 535, L. 1975; Sec. 93-6711, R.C.M. 1947; R.C.M. 1947, 93-6710, 93-6711(part).

25-31-408. Who may serve summons — method of service, return. (1) The summons may be served by a sheriff or constable of any of the counties of this state or by any person resident in the state, 18 years of age or older, not a party to the suit.

(2) The summons must be served and returned as provided in M.R.Civ.P., Rule 4D (2), (3), (4), (8), and (9), or it may be served by publication, provided in M.R.Civ.P., Rule 4D (5) and (8), so far as they relate to publication of summons,

are made applicable to justices' courts, the word "justice" being substituted for the word "clerk" whenever the latter word occurs.

(3) Sections 25-3-201(2), 25-3-202, 25-3-204 through 25-3-206, 25-3-301(2), 25-3-302, and 25-10-206 and part 6 of chapter 3 apply to service and return of process in justice's court.

History: (1), (2)En. Sec. 1510, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 61, L. 1903; re-en. Sec. 7003, Rev. C. 1907; re-en. Sec. 9636, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 849; re-en. Sec. 9636, R.C.M. 1935; amd. Sec. 1, Ch. 110, L. 1967; amd. Sec. 57, Ch. 535, L. 1975; Sec. 93-6711, R.C.M. 1947; (3)En. by Code Commissioner, 1979; R.C.M. 1947, 93-6711(part).

25-31-409. Alias summons. If the summons is returned without being served upon any or all of the defendants, the justice, upon the demand of the plaintiff, may issue an alias summons in the same form as the original. The justice may, within a year from the date of filing the complaint, issue as many alias summonses as may be demanded by the plaintiff.

History: Ap. p. Sec. 1507, C. Civ. Proc. 1895; re-en. Sec. 7000, Rev. C. 1907; re-en. Sec. 9633, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 846; re-en. Sec. 9633, R.C.M. 1935; amd. Sec. 4, Ch. 34, L. 1937; Sec. 93-6708, R.C.M. 1947; Ap. p. Sec. 1508, C. Civ. Proc. 1895; re-en. Sec. 7001, Rev. C. 1907; re-en. Sec. 9634, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 847; re-en. Sec. 9634, R.C.M. 1935; Sec. 93-6709, R.C.M. 1947; R.C.M. 1947, 93-6708, 93-6709.

Part 5

Pleadings

25-31-501. Form of pleadings. Pleadings in justices' courts:

(1) are not required to be in any particular form but must be such as to enable a person of common understanding to know what is intended;

(2) may, except the complaint, be oral or in writing;

(3) must not be verified unless otherwise provided in this chapter, Title 27, chapter 16, part 10, or Title 27, chapter 9, 17, or 18;

(4) if in writing, must be filed with the justice;

(5) if oral, an entry of their substance must be made in the docket;

(6) in cases of forcible entry and unlawful detainer, must be verified.

History: En. Sec. 1520, C. Civ. Proc. 1895; re-en. Sec. 7005, Rev. C. 1907; re-en. Sec. 9638, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 851; re-en. Sec. 9638, R.C.M. 1935; R.C.M. 1947, 93-6801.

25-31-502. Permissible pleadings. In justice's court, there shall be a complaint and answer, a reply to a counterclaim denominated as such, an answer to a cross-claim, a third-party complaint if a person who is not an original party is brought into the action, and a third-party answer if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

History: En. Sec. 1, Ch. 168, L. 1967; R.C.M. 1947, 93-6802.1.

25-31-503. Demurrers abolished. Demurrers and exceptions for insufficiency of a pleading shall not be used.

History: En. Sec. 2, Ch. 168, L. 1967; amd. Sec. 16, Ch. 420, L. 1975; R.C.M. 1947, 93-6802.2.

25-31-504. Complaint. The complaint in justices' courts is a concise statement in writing of the facts constituting the plaintiff's cause of action or a copy of the account, note, bill, bond, or instrument upon which the action is based.

History: En. Sec. 1522, C. Civ. Proc. 1895; re-en. Sec. 7007, Rev. C. 1907; re-en. Sec. 9640, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 853; re-en. Sec. 9640, R.C.M. 1935; R.C.M. 1947, 93-6803.

25-31-505. Answer. The answer may contain a general denial of any or all the material facts stated in the complaint which the defendant believes to be untrue and also a statement, in a plain and direct manner, of any other facts containing a defense or counterclaim upon which an action might be brought by the defendant against the plaintiff in a justice's court. He may file a copy of an account, note, bill, bond, or other instrument as a counterclaim.

History: En. Sec. 1524, C. Civ. Proc. 1895; re-en. Sec. 7009, Rev. C. 1907; re-en. Sec. 9642, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 855; re-en. Sec. 9642, R.C.M. 1935; R.C.M. 1947, 93-6805.

25-31-506. Compulsory counterclaim. If the defendant omits to set up a counterclaim in the cases mentioned in 25-31-505, neither he nor his assignee can afterward maintain an action against the plaintiff therefor. If the counterclaim exceeds $300, he need not set it up.

History: En. Sec. 1525, C. Civ. Proc. 1895; re-en. Sec. 7010, Rev. C. 1907; re-en. Sec. 9643, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 856; re-en. Sec. 9643, R.C.M. 1935; R.C.M. 1947, 93-6806.

25-31-507. Denial of new matter. The new matter contained in the answer or counterclaim is deemed denied by the plaintiff.

History: En. Sec. 1528, C. Civ. Proc. 1895; re-en. Sec. 7013, Rev. C. 1907; re-en. Sec. 9646, R.C.M. 1921; re-en. Sec. 9646, R.C.M. 1935; R.C.M. 1947, 93-6809.

25-31-508 through 25-31-510 reserved.

25-31-511. Pleading an account or instrument. When the cause of action or the defense or counterclaim arises upon an account or instrument for the payment of money only, it shall be sufficient for the party to deliver a copy of the account or instrument to the party demanding it and to state that there is due to him thereon from the adverse party a specified sum, but the court may, at any time, require the original account or instrument to be exhibited to the inspection of the adverse party and a copy to be furnished or, if it be not so exhibited and a copy furnished, may prohibit its being afterwards given in evidence unless it appear that such instrument is not in the possession of the party pleading it or under his control. The court may, at any time, require either party to furnish to the other the items of an account or a bill of particulars.

History: En. Sec. 588, p. 158, Bannack Stat.; re-en. Sec. 694, p. 175, Cod. Stat. 1871; re-en. Sec. 754, 1st Div. Rev. Stat. 1879; re-en. Sec. 774, 1st Div. Comp. Stat. 1887; en. Sec. 1531, C. Civ. Proc. 1895; re-en. Sec. 7016, Rev. C. 1907; re-en. Sec. 9649, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 886; re-en. Sec. 9649, R.C.M. 1935; R.C.M. 1947, 93-6812.

25-31-512. Admission of genuineness of signatures. If the plaintiff annex to his complaint or file with the justice at the time of issuing the summons a copy of the promissory note, bill of exchange, other obligation for the payment of money, or other instrument upon which the action is brought, the defendant shall be deemed to admit the genuineness of all the signatures thereto unless he specifically deny the same in his answer under oath. In case of a counterclaim, the same rule applies to the plaintiff.

History: En. Sec. 589, p. 159, Bannack Stat.; re-en. Sec. 695, p. 175, Cod. Stat. 1871; re-en. Sec. 755, 1st Div. Rev. Stat. 1879; re-en. Sec. 775, 1st Div. Comp. Stat. 1887; amd. Sec. 1532, C. Civ. Proc. 1895; re-en. Sec. 7017, Rev. C. 1907; re-en. Sec. 9650, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 887; re-en. Sec. 9650, R.C.M. 1935; R.C.M. 1947, 93-6813.

25-31-513 through 25-31-520 reserved.

25-31-521. Amendment of pleadings. Either party may, at any time before the conclusion of the trial, amend any pleading; but if the amendment is made after the issue and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment must be granted. When an adjournment will be rendered necessary by the amendment, the court may also, in its discretion, require as a condition to the allowance of such amendment, made after issue joined, the payment of costs to the adverse party, to be fixed by the court, not exceeding $20.

History: En. Sec. 1529, C. Civ. Proc. 1895; re-en. Sec. 7014, Rev. C. 1907; re-en. Sec. 9647, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 859; re-en. Sec. 9647, R.C.M. 1935; R.C.M. 1947, 93-6810(part).

25-31-522. Answer to amended pleading. When a pleading is amended, the adverse party may answer it within such time, not exceeding 2 days, as the court may allow.

History: En. Sec. 1530, C. Civ. Proc. 1895; re-en. Sec. 7015, Rev. C. 1907; re-en. Sec. 9648, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 860; re-en. Sec. 9648, R.C.M. 1935; amd. Sec. 15, Ch. 420, L. 1975; R.C.M. 1947, 93-6811.

25-31-523. Variance. A variance between the proof on the trial and the allegations in pleading shall be disregarded as immaterial unless the court be satisfied that the adverse party has been misled to his prejudice thereby.

History: En. Sec. 591, p. 159, Bannack Stat.; re-en. Sec. 697, p. 176, Cod. Stat. 1871; re-en. Sec. 757, 1st Div. Rev. Stat. 1879; re-en. Sec. 777, 1st Div. Comp. Stat. 1887; re-en. Sec. 1533, C. Civ. Proc. 1895; re-en. Sec. 7018, Rev. C. 1907; re-en. Sec. 9651, R.C.M. 1921; re-en. Sec. 9651, R.C.M. 1935; R.C.M. 1947, 93-6814.

Part 6

Parties

25-31-601. Who may act as attorney. Parties in justice's court may appear and act in person or by attorney; and any person, except the constable by whom the summons or jury process was served, may act as attorney.

History: En. Sec. 551, p. 151, Bannack Stat.; re-en. Sec. 657, p. 167, Cod. Stat. 1871; re-en. Sec. 717, 1st Div. Rev. Stat. 1879; re-en. Sec. 737, 1st Div. comp. Stat. 1887; amd. Sec. 1503, C. Civ. Proc. 1895; re-en. Sec. 6996, Rev. C. 1907; re-en. Sec. 9629, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 842; re-en. Sec. 9629, R.C.M. 1935; R.C.M. 1947, 93-6704.

25-31-602. When guardian necessary — how appointed. When an infant, insane, or incompetent person is a party, he must appear either by his general guardian, if he have one, or by a guardian ad litem appointed by the justice. When a guardian ad litem is appointed by the justice, he must be appointed as follows:

(1) If the infant, insane, or incompetent person be plaintiff, the appointment must be made before the summons is issued:

(a) upon the application of the infant, if he be of the age of 14 years;

(b) if under that age or if insane or incompetent, upon the application of a relative or friend.

(2) If the infant, insane, or incompetent person be defendant, the appointment must be made at the time the summons is returned or before the answer:

(a) upon the application of the infant, if he be of the age of 14 years and apply at the time or before the summons is returned;

(b) if he be under the age of 14 years or be insane or incompetent or neglect so to apply, then upon the application of a relative or friend or any other party to the action, or by the justice, on his own motion.

History: En. Sec. 555, p. 151, Bannack Stat.; re-en. Sec. 661, p. 169, Cod. Stat. 1871; re-en. Sec. 721, 1st Div. Rev. Stat. 1879; re-en. Sec. 741, 1st Div. Comp. Stat. 1887; en. Sec. 1504, C. Civ. Proc. 1895; re-en. Sec. 6997, Rev. C. 1907; re-en. Sec. 9630, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 843; re-en. Sec. 9630, R.C.M. 1935; R.C.M. 1947, 93-6705.

Part 7

Time of Trial — Postponements

25-31-701. Fixing day of trial — notice. When all parties served with process shall have appeared or some of them have appeared and the remaining defendants have made default, the justice must fix a day for the trial of said cause and notify the plaintiffs and the defendants who have appeared thereof.

History: En. Sec. 1511, C. Civ. Proc. 1895; re-en. Sec. 7004, Rev. C. 1907; re-en. Sec. 9637, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 850; re-en. Sec. 9637, R.C.M. 1935; amd. Sec. 5, Ch. 34, L. 1937; R.C.M. 1947, 93-6712.

25-31-702. Trial to be timely. Unless postponed as provided in this part or transferred to another court, the trial of the action must commence at the expiration of 1 hour from the time specified in the notice mentioned in 25-31-701, and the trial must proceed and there must be no adjournment for more than 24 hours at any one time until all the issues therein are disposed of.

History: En. Sec. 1590, C. Civ. Proc. 1895; re-en. Sec. 7033, Rev. C. 1907; re-en. Sec. 9666, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 873; re-en. Sec. 9666, R.C.M. 1935; R.C.M. 1947, 93-7101.

25-31-703. Postponement by motion of court. The court may, of its own motion, postpone the trial:

(1) for not exceeding 1 day if, at the time fixed by law or by an order of the court for the trial, the court is engaged in the trial of another action;

(2) for not exceeding 2 days if, by an amendment of the pleadings or the allowance of time to make such amendment or to plead, a postponement is rendered necessary;

(3) for not exceeding 3 days if the trial is upon issues of fact and a jury has been demanded.

History: En. Sec. 1591, C. Civ. Proc. 1895; re-en. Sec. 7034, Rev. C. 1907; re-en. Sec. 9667, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 874; re-en. Sec. 9667, R.C.M. 1935; R.C.M. 1947, 93-7102.

25-31-704. Postponement by consent of parties. The court may, by the consent of the parties given in writing or in open court, postpone the trial to a time agreed upon by the parties.

History: En. Sec. 1592, C. Civ. Proc. 1895; re-en. Sec. 7035, Rev. C. 1907; re-en. Sec. 9668, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 875; re-en. Sec. 9668, R.C.M. 1935; R.C.M. 1947, 93-7103.

25-31-705. Postponement upon application of a party — proof required. The trial may be postponed upon the application of either party for a period not exceeding 4 months. The party making the application must prove, by his own oath or otherwise, that he cannot, for want of material testimony which he expects to procure, safely proceed to trial and must show in what respect the testimony expected is material and that he has used due diligence to procure it and has been unable to do so.

History: En. Sec. 596, p. 161, Bannack Stat.; re-en. Sec. 702, p. 177, Cod. Stat. 1871; re-en. Sec. 762, 1st Div. Rev. Stat. 1879; re-en. Sec. 782, 1st Div. Comp. Stat. 1887; en. Sec. 1593, C. Civ. Proc. 1895; re-en. Sec. 7036, Rev. C. 1907; re-en. Sec. 9669, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 876; re-en. Sec. 9669, R.C.M. 1935; R.C.M. 1947, 93-7104(part).

25-31-706. No postponement when expected evidence admitted. The court may require the party making the application to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given and that it be considered as actually given on the trial or offered and overruled as improper, the trial must not be postponed.

History: En. Sec. 596, p. 161, Bannack Stat.; re-en. Sec. 702, p. 177, Cod. Stat. 1871; re-en. Sec. 762, 1st Div. Rev. Stat. 1879; re-en. Sec. 782, 1st Div. Comp. Stat. 1887; en. Sec. 1593, C. Civ. Proc. 1895; re-en. Sec. 7036, Rev. C. 1907; re-en. Sec. 9669, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 876; re-en. Sec. 9669, R.C.M. 1935; R.C.M. 1947, 93-7104(part).

25-31-707. Procedure when defendant under arrest. (1) If the application is on the part of the plaintiff and the defendant is under arrest, a postponement for more than 3 hours discharges the defendant from custody; but the action may proceed, notwithstanding, and the defendant is subject to arrest on execution in the same manner as if he had not been discharged.

(2) If the application is on the part of a defendant under arrest, before it can be granted he must execute an undertaking, with two or more sufficient sureties to be approved by and in a sum to be fixed by the justice, to the effect that he will render himself amenable to the process of the court during the pendency of the action and to such as may be issued to enforce the judgment therein, or that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action, not exceeding the amount specified in the undertaking. On filing the undertaking specified in this subsection, the justice may order the defendant discharged from custody.

History: En. Sec. 596, p. 161, Bannack Stat.; re-en. Sec. 702, p. 177, Cod. Stat. 1871; re-en. Sec. 762, 1st Div. Rev. Stat. 1879; re-en. Sec. 782, 1st Div. Comp. Stat. 1887; en. Sec. 1593, C. Civ. Proc. 1895; re-en. Sec. 7036, Rev. C. 1907; re-en. Sec. 9669, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 876; re-en. Sec. 9669, R.C.M. 1935; R.C.M. 1947, 93-7104(2), (3).

25-31-708. Deposition of witnesses upon postponement. The party making the application must, if required by the adverse party, consent that the testimony of any witness of such adverse party who is in attendance may be then taken by deposition before the justice and that the testimony so taken may be read on trial with the same effect and subject to the objections as if the witness were produced.

History: En. Sec. 596, p. 161, Bannack Stat.; re-en. Sec. 702, p. 177, Cod. Stat. 1871; re-en. Sec. 762, 1st Div. Rev. Stat. 1879; re-en. Sec. 782, 1st Div. Comp. Stat. 1887; en. Sec. 1593, C. Civ. Proc. 1895; re-en. Sec. 7036, Rev. C. 1907; re-en. Sec. 9669, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 876; re-en. Sec. 9669, R.C.M. 1935; R.C.M. 1947, 93-7104(part).

25-31-709. Time limit on adjournment — undertaking. No adjournment must, unless by consent, be granted for a period longer than 10 days upon the application of either party except upon condition that such party file an undertaking, in an amount fixed by the justice, with two sureties to be approved by the justice, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying, not exceeding the sum specified in the undertaking.

History: En. Sec. 598, p. 162, Bannack Stat.; re-en. Sec. 704, p. 178, Cod. Stat. 1871; re-en. Sec. 764, 1st Div. Rev. Stat. 1879; re-en. Sec. 784, 1st Div. Comp. Stat. 1887; amd. Sec. 1594, C. Civ. Proc. 1895; re-en. Sec. 7037, Rev. C. 1907; re-en. Sec. 9670, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 877; re-en. Sec. 9670, R.C.M. 1935; R.C.M. 1947, 93-7105.

Part 8

Trial

25-31-801. Issue defined, types of issues. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:

(1) of law; and

(2) of fact.

History: En. Sec. 1600, C. Civ. Proc. 1895; re-en. Sec. 7038, Rev. C. 1907; re-en. Sec. 9671, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 878; re-en. Sec. 9671, R.CM. 1935; R.C.M. 1947, 93-7201.

25-31-802. How issues of fact arise. An issue of fact arises:

(1) upon a material allegation in the complaint controverted by the answer; and

(2) upon new matter in the answer, except an issue of law is joined thereon.

History: En. Sec. 1602, C. Civ. Proc. 1895; re-en. Sec. 7040, Rev. C. 1907; re-en. Sec. 9673, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 880; re-en. Sec. 9673, R.C.M. 1935; R.C.M. 1947, 93-7203.

25-31-803. By whom issues tried. (1) An issue of law must be tried by the court.

(2) An issue of fact must be tried by a jury unless a jury is waived, in which case it must be tried by the court.

History: En. Secs. 1603, 1604, C. Civ. Proc. 1895; re-en. Secs. 7041, 7042, Rev. C. 1907; re-en. Secs. 9674, 9675, R.C.M. 1921; Cal. C. Civ. Proc. Secs. 881, 882; re-en. Secs. 9674, 9675, R.C.M. 1935; R.C.M. 1947, 93-7204, 93-7205.

25-31-804. Waiver of jury trial. A jury may be waived by:

(1) consent of parties entered in the docket;

(2) a failure of either party to demand a jury before the commencement of the trial of an issue of fact;

(3) the failure of either party to appear at the time fixed for the trial of an issue of fact.

History: En. Sec. 1605, C. Civ. Proc. 1895; re-en. Sec. 7043, Rev. C. 1907; re-en. Sec. 9676, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 883; re-en. Sec. 9676, R.C.M. 1935; R.C.M. 1947, 93-7206.

25-31-805 through 25-31-810 reserved.

25-31-811. Trial after nonappearance of a party. If either party fails to appear at the time fixed for trial, the trial may proceed at the request of the adverse party.

History: En. Sec. 600, p. 162, Bannack Stat.; re-en. Sec. 706, p. 178, Cod. Stat. 1871; re-en. Sec. 766, 1st Div. Rev. Stat. 1879; re-en. Sec. 786, 1st Div. Comp. Stat. 1887; amd. Sec. 1606, C. Civ. Proc. 1895; re-en. Sec. 7044, Rev. C. 1907; re-en. Sec. 9677, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 884; re-en. Sec. 9677, R.C.M. 1935; R.C.M. 1947, 93-7207.

25-31-812. Challenges to jurors. The challenges are either peremptory or for cause:

(1) Each party is entitled to two peremptory challenges. They shall be exercised by the plaintiff first striking one and the defendant then striking one, and so on until each side has exhausted or waived his rights.

(2) Either party may challenge for cause on any grounds set forth in 25-7-223. Challenges for cause must be tried by the justice.

History: Ap. p. Sec. 604, p. 162, Bannack Stat.; re-en. Sec. 710, p. 178, Cod. Stat. 1871; re-en. Sec. 770, 1st Div. Rev. Stat. 1879; re-en. Sec. 790, 1st Div. Comp. Stat. 1887; amd. Sec. 1607, C. Civ. Proc. 1895; re-en. Sec. 7045, Rev. C. 1907; re-en. Sec. 9678, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 885; re-en. Sec. 9678, R.C.M. 1935; Sec. 93-7208, R.C.M. 1947; Ap. p. Sec. 224, C. Civ. Proc. 1895; re-en. Sec. 6334, Rev. C. 1907; re-en. Sec. 8887, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 194; re-en. Sec. 8887, R.C.M. 1935; amd. Sec. 4, Ch. 203, L. 1939; amd. Sec. 1, Ch. 293, L. 1971; Sec. 93-1205, R.C.M. 1947; R.C.M. 1947, 93-1205(part), 93-7208.

Part 9

Judgment

25-31-901. Procedure upon default. If the defendant fails to appear, answer, or demur within the time specified in the summons, then the defendant shall be in default and his default shall be entered accordingly by the court. Evidence may then be submitted and judgment rendered and entered in accordance with the statement in the summons or as prayed for in the complaint at any time within 90 days from the date of the entry of such default of the defendant.

History: En. Sec. 1580, C. Civ. Proc. 1895; re-en. Sec. 7031, Rev. C. 1907; re-en. Sec. 9664, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 871; re-en. Sec. 9664, R.C.M. 1935; amd. Sec. 1, Ch. 34, L. 1937; amd. Sec. 2, Ch. 91, L. 1939; R.C.M. 1947, 93-7001.

25-31-902. Cases treated as a default. In the following cases the same proceedings must be had and judgment must be rendered in like manner as if the defendant had failed to appear and answer or demur:

(1) if the complaint has been amended and the defendant fails to answer it as amended within the time allowed by the court;

(2) if the demurrer to the complaint is overruled and the defendant fails to answer at once;

(3) if the demurrer to the answer is sustained and the defendant fails to amend the answer within the time allowed by the court.

History: En. Sec. 1581, C. Civ. Proc. 1895; re-en. Sec. 7032, Rev. C. 1907; re-en. Sec. 9665, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 872; re-en. Sec. 9665, R.C.M. 1935; R.C.M. 1947, 93-7002.

25-31-903. Judgment of dismissal without prejudice. Judgment that the action be dismissed without prejudice to a new action may be entered with costs in the following cases:

(1) when the plaintiff voluntarily dismisses the action, at or before the close of his evidence, when there is no counterclaim;

(2) when he fails to appear at any time within 5 days after default has been entered or at the time to which the action has been postponed;

(3) when, after a demurrer to the complaint has been sustained, the plaintiff fails to amend it within the time allowed by the court;

(4) when it is objected at the trial and appears by the evidence that the action is brought in the wrong county.

History: En. Sec. 605, p. 163, Bannack Stat.; re-en. Sec. 711, p. 179, Cod. Stat. 1871; re-en. Sec. 771, 1st Div. Rev. Stat. 1879; re-en. Sec. 791, 1st Div. Comp. Stat. 1887; amd. Sec. 1621, C. Civ. Proc. 1895; re-en. Sec. 7047, Rev. C. 1907; re-en. Sec. 9680, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 890; re-en. Sec. 9680, R.C.M. 1935; amd. Sec. 2, Ch. 34, L. 1937; amd. Sec. 19, Ch. 491, L. 1973; R.C.M. 1947, 93-7302(part).

25-31-904. Entry of judgment. When a trial by jury has been had, judgment must be entered by the justice, at once, in conformity with the verdict. When the trial is by the court, judgment must be entered at the close of the trial.

History: En. Sec. 608, p. 163, Bannack Stat.; re-en. Sec. 714, p. 180, Cod. Stat. 1871; re-en. Sec. 774, 1st Div. Rev. Stat. 1879; re-en. Sec. 794, 1st Div. Comp. Stat. 1887; amd. Secs. 1622, 1623, C. Civ. Proc. 1895; re-en. Secs. 7048, 7049, Rev. C. 1907; re-en. Secs. 9681, 9682, R.C.M. 1921; Cal. C. Civ. Proc. Secs. 891, 892; re-en. Secs. 9681, 9682, R.C.M. 1935; R.C.M. 1947, 93-7303, 93-7304.

25-31-905. Judgment when only part of defendants served. If the action be on a contract against two or more defendants and the summons be served on one or more but not on all:

(1) the judgment shall be entered up only against those who were served if the contract be a several or a joint and several contract; but

(2) if the contract be a joint contract only, the judgment shall be entered up against all the defendants but shall only be enforced against the joint property of all and the separate property of the defendants served.

History: En. Sec. 610, p. 163, Bannack Stat.; re-en. Sec. 715, p. 180, Cod. Stat. 1871; re-en. Sec. 775, 1st Div. Rev. Stat. 1879; re-en. Sec. 795, 1st Div. Comp. Stat. 1887; re-en. Sec. 1625, C. Civ. Proc. 1895; re-en. Sec. 7051, Rev. C. 1907; re-en. Sec. 9684, R.C.M. 1921; re-en. Sec. 9684, R.C.M. 1935; R.C.M. 1947, 93-7306.

25-31-906. Judgment when amount found due exceeds the jurisdiction of the court. When the amount found due to either party exceeds the sum for which the justice is authorized to enter judgment, such party may remit the excess and judgment may be entered for the residue.

History: En. Sec. 610, p. 163, Bannack Stat.; re-en. Sec. 716, p. 180, Cod. Stat. 1871; re-en. Sec. 776, 1st Div. Rev. Stat. 1879; re-en. Sec. 796, 1st Div. Comp. Stat. 1887; re-en. Sec. 1626, C. Civ. Proc. 1895; re-en. Sec. 7052, Rev. C. 1907;

re-en. Sec. 9685, R.C.M. 1921; Cal. C. Civ. Pro. Sec. 894; re-en. Sec. 9685, R.C.M. 1935; R.C.M. 1947, 93-7307.

25-31-907. Judgment when counterclaim has been established. Where a counterclaim is established which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess.

History: En. Sec. 1627, C. Civ. Proc. 1895; re-en. Sec. 7053, Rev. C. 1907; re-en. Sec. 9686, R.C.M. 1921; re-en. Sec. 9686, R.C.M. 1935; R.C.M. 1947, 93-7308.

25-31-908. Judgment when defendant subject to arrest. When the judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, the fact that the defendant is so subject must be stated in the judgment.

History: En. Sec. 612, p. 164, Bannack Stat.; re-en. Sec. 718, p. 179, Cod. Stat. 1871; re-en. Sec. 778, 1st Div. Rev. Stat. 1879; re-en. Sec. 798, 1st Div. Comp. Stat. 1887; amd. Sec. 1624, C. Civ. Proc. 1895; re-en. Sec. 7050, Rev. C. 1907; re-en. Sec. 9683, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 893; re-en. Sec. 9683, R.C.M. 1935; R.C.M. 1947, 93-7305(part).

25-31-909 and 25-31-910 reserved.

25-31-911. Abstract of judgment. The justice, on the demand of a party in whose favor judgment is rendered, must give him an abstract of the judgment in substantially the following form (filling blanks according to the facts):

"State of Montana
County of ....

...., plaintiff
vs.
...., defendant

In justice's court, before ...., justice of the peace, ... County, ..., 19.. (inserting date of abstract). Judgment entered for plaintiff (or defendant) for $...., on the .... day of ....., I certify that the foregoing is a correct abstract of a judgment rendered in said action in my court [or (as the case may be) in the court of ...., justice of the peace, as it appears by his docket now in my possession as his successor in office].

...., Justice of the Peace."

History: En. Sec. 614, p. 164, Bannack Stat.; re-en. Sec. 720, p. 180, Cod. Stat. 1871; amd. Sec. 1, p. 38, L. 1876; re-en. Sec. 780, p. 184, 1st Div. Rev. Stat. 1879; re-en. Sec. 800, 1st Div. Comp. Stat. 1887; en. Sec. 1630, C. Civ. Proc. 1895; re-en. Sec. 7056, Rev. C. 1907; re-en. Sec. 9689, R.C.M. 1921; Cal. C. Civ. Proc. Sec 897; re-en. Sec. 9689, R.C.M. 1935; amd. Sec. 20, Ch. 491, L. 1973; R.C.M. 1947, 93-7311.

25-31-912. Filing and docketing of judgment in district court. The abstract may be filed in the office of the clerk of the district court of the county in which the judgment was rendered and the judgment docketed in the judgment docket of the district court thereof. The time of the receipt of the abstract by the clerk must be noted by him thereon and entered in the docket.

History: En. Sec. 614, p. 164, Bannack Stat.; re-en. Sec. 720, p. 180, Cod. Stat. 1871; amd. Sec. 1, p. 38, L. 1876; re-en. Sec. 780, p. 184, 1st Div. Rev. Stat. 1879; re-en. Sec. 800, 1st Div. Comp. Stat. 1887; en. Sec. 1631, C. Civ. Proc. 1895; re-en.

Sec. 7057, Rev. C. 1907; re-en. Sec. 9690, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 898; re-en. Sec. 9690, R.C.M. 1935; R.C.M. 1947, 93-7312.

25-31-913. Issuance of execution by clerk of district court. From the time of docketing in the clerk's office, execution may be issued thereon by the clerk to the sheriff of any county in the state in the same manner and with like effect as if issued on a judgment of the district court.

History: En. Sec. 614, p. 164, Bannack Stat.; re-en. Sec. 720, p. 180, Cod. Stat. 1871; amd. Sec. 1, p. 38, L. 1876; re-en. Sec. 780, p. 184, 1st Div. Rev. Stat. 1879; re-en. Sec. 800, 1st Div. Comp. Stat. 1887; en. Sec. 1632, C. Civ. Proc. 1895; amd. Sec. 1, p. 242, L. 1897; re-en. Sec. 7058, Rev. C. 1907; re-en. Sec. 9691, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 899; re-en. Sec. 9691, R.C.M. 1935; R.C.M. 1947, 93-7313.

25-31-914. Lien on real property. The judgment rendered in a justice's court creates no lien upon any lands of the defendant unless such abstract is filed as aforesaid in the office of the clerk of the district court of the county in which the lands are situated. When so filed and from the time of filing, the judgment becomes a lien upon all real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time or which he may afterwards and before the lien expires acquire. The lien continues for 6 years unless the judgment be previously satisfied.

History: En. Sec. 614, p. 164, Bannack Stat.; re-en. Sec. 720, p. 180, Cod. Stat. 1871; amd. Sec. 1, p. 38, L. 1876; re-en. Sec. 780, p. 184, 1st Div. Rev. Stat. 1879; re-en. Sec. 800, 1st Div. Comp. Stat. 1887; en. Sec. 1633, C. Civ. Proc. 1895; amd. Sec. 2, p. 243, L. 1897; re-en. Sec. 7059, Rev. C. 1907; re-en. Sec. 9692, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 900; re-en. Sec. 9692, R.C.M. 1935; R.C.M. 1947, 93-7314.

25-31-915. Relief from judgment. The court may, on such terms as may be just and on the payment of costs, relieve a party from any judgment taken against him by mistake, inadvertence, surprise, or excusable neglect, but the application for such relief must be made within 10 days after the entry of the judgment and upon an affidavit showing good cause therefor.

History: En. Sec. 1529, C. Civ. Proc. 1895; re-en. Sec. 7014, Rev. C. 1907; re-en. Sec. 9647, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 859; re-en. Sec. 9647, R.C.M. 1935; R.C.M. 1947, 93-6810(part).

Part 10

Costs

25-31-1001. Who entitled to costs. The prevailing party in justices' courts is entitled to costs of the action and also of all proceedings taken by him in aid of execution issued upon any judgment recovered therein.

History: En. Sec. 1685, C. Civ. Proc. 1895; re-en. Sec. 7083, Rev. C. 1907; re-en. Sec. 9716, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 924; amd. Sec. 19, Ch. 177, L. 1935; re-en. Sec. 9716, R.C.M. 1935; amd. Sec. 1, Ch. 156, L. 1937; R.C.M. 1947, 93-7706.

25-31-1002. How costs taxed. In a justice's or city court, no cost bill need be filed, but the justice or judge must tax the same and make an itemized statement of all the costs incurred by each party in his docket.

History: En. Sec. 1868, C. Civ. Proc. 1895; re-en. Sec. 7171, Rev. C. 1907; re-en. Sec. 9804, R.C.M. 1921; re-en. Sec. 9804, R.C.M. 1935; R.C.M. 1947, 93-8620(part).

25-31-1003. Costs to be included in judgment. The justice must tax and include in the judgment the costs allowed by law to the prevailing party.

History: En. Sec. 643, p. 171, Bannack Stat.; re-en. Sec. 748, p. 186, Cod. Stat. 1871; re-en. Sec. 808, 1st Div. Rev. Stat. 1879; re-en. Sec. 828, 1st Div. Comp. Stat. 1887; re-en. Sec. 1629, C. Civ. Proc. 1895; re-en. Sec. 7055, Rev. C. 1907; re-en. Sec. 9688, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 896; re-en. Sec. 9688, R.C.M. 1935; R.C.M. 1947, 93-7310.

25-31-1004. Jurors' fees. In justices' and city courts, the fees paid to jurors must be taxed against the unsuccessful party.

History: En. Sec. 1868, C. Civ. Proc. 1895; re-en. Sec. 7171, Rev. C. 1907; re-en. Sec. 9804, R.C.M. 1921; re-en. Sec. 9804, R.C.M. 1935; R.C.M. 1947, 93-8620(part).

25-31-1005. Costs of transferring papers — change of venue. The costs and fees of transmitting the pleading and papers when an order is made transferring an action or proceeding for trial and of filing the papers anew must be paid by the party at whose instance the order was made; except that the party filing the complaint must pay all costs and fees of filing the papers anew and all costs and fees, including reasonable attorneys' fees to be fixed by the court, incurred by the defendant by reason of the change of venue motion and hearing when:

(1) the action is an action upon a contract, express or implied, for the direct payment of money and no claim contained in the complaint exceeds $1,000;

(2) the county designated in the complaint is not the proper county; and

(3) the plaintiff will not within 10 days after request stipulate for change of venue and defendant files a motion for such change and such motion is thereafter granted.

History: En. Sec. 64, p. 53, L. 1877; re-en. Sec. 64, 1st Div. Rev. Stat. 1879; re-en. Sec. 64, 1st Div. Comp. Stat. 1887; re-en. Sec. 617, C. Civ. Proc. 1895; re-en. Sec. 6508, Rev. C. 1907; re-en. Sec. 9100, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 399; re-en. Sec. 9100, R.C.M. 1935; amd. Sec. 1, Ch. 176, L. 1971; R.C.M. 1947, 93-2908(part).

Part 11

Execution of Judgment

25-31-1101. When justice may issue execution. Execution for the enforcement of a judgment of a justice's court may be issued by the justice who entered the judgment or his successor in office, on the application of the party entitled thereto, at any time within 5 years from the entry of judgment.

History: En. Sec. 615, p. 165, Bannack Stat.; re-en. Sec. 721, p. 181, Cod. Stat. 1871; re-en. Sec. 781, 1st Div. Rev. Stat. 1879; re-en. Sec. 801, 1st Div. Comp. Stat. 1887; amd. Sec. 1640, C. Civ. Proc. 1895; re-en. Sec. 7060, Rev. C. 1907; amd. Sec. 1, Ch. 38, L. 1921; re-en. Sec. 9693, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 901; re-en. Sec. 9693, R.C.M. 1935; R.C.M. 1947, 93-7401.

25-31-1102. Form and content of execution. The execution must be directed to the sheriff or to a constable of the county and must be subscribed by the justice and bear the date of the day of its issuance. It must intelligibly refer to the judgment by stating the names of the parties; the name of the justice before whom, the county where, and the time when it was rendered; the amount of the judgment if it be for money; and if less than the whole is due, the true amount due thereon. It must contain, in like cases, similar directions to the sheriff or constable as are required by the provisions of chapter 13 in an execution to the sheriff, except that it shall not direct the officer to in any manner levy upon or satisfy the judgment or any interest thereon from any real property.

History: En. Sec. 616, p. 165, Bannack Stat.; amd. Sec. 722, p. 181, Cod. Stat. 1871; re-en. Sec. 782, 1st Div. Rev. Stat. 1879; re-en. Sec. 802, 1st Div. Comp. Stat. 1887; amd. Sec. 1641, C. Civ. Proc. 1895; amd. Sec. 1641, p. 243, L. 1897; re-en. Sec. 7061, Rev. C. 1907; re-en. Sec. 9694, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 902; re-en. Sec. 9694, R.C.M. 1935; amd. Sec. 21, Ch. 491, L. 1973; R.C.M. 1947, 93-7402.

25-31-1103. Renewal and reissuance of execution. An execution may, at the request of the judgment creditor, be renewed before the expiration of the time fixed for its return, by the word "renewed" written thereon, with the date thereof, and subscribed by the justice. Such renewal has the effect of an original issue and may be repeated as often as necessary. If an execution is returned unsatisfied, another may be afterward issued.

History: En. Sec. 1642, C. Civ. Proc. 1895; re-en. Sec. 7062, Rev. C. 1907; re-en. Sec. 9695, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 903; re-en. Sec. 9695, R.C.M. 1935; R.C.M. 1947, 93-7403.

25-31-1104. Manner of execution. The sheriff or constable to whom the execution is directed must execute the same in the same manner as the sheriff is required by the provisions of chapter 13 to proceed upon executions directed to him; and the constable, when the execution is directed to him, is vested for that purpose with all the powers of the sheriff.

History: En. Sec. 617, p. 165, Bannack Stat.; re-en. Sec. 723, p. 181, Cod. Stat. 1871; re-en. Sec. 783, 1st Div. Rev. Stat. 1879; re-en. Sec. 803, 1st Div. Comp. Stat. 1887; amd. Sec. 1643, C. Civ. Proc. 1895; re-en. Sec. 7063, Rev. C. 1907; re-en. Sec. 9696, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 904; re-en. Sec. 9696, R.C.M. 1935; R.C.M. 1947, 93-7404.

25-31-1105. Proceedings in aid of execution. Section 25-13-502 and part 1 of chapter 14, except 25-14-106, are applicable to justices' courts, the word "constable" being substituted, to that end, for the word "sheriff" and the word "justice" for the word "judge".

History: En. Sec. 1644, C. Civ. Proc. 1895; re-en. Sec. 7064, Rev. C. 1907; re-en. Sec. 9697, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 905; re-en. Sec. 9697, R.C.M. 1935; R.C.M. 1947, 93-7405.

25-31-1106. Discharge of imprisoned judgment debtor. The provisions of part 3 of chapter 14 in relation to the examination and discharge of a defendant imprisoned on execution in a civil action shall apply to justices' courts, and justices of the peace shall have the same powers in their courts as are by said sections granted to the judge.

History: En. Sec. 673, p. 172, Cod. Stat. 1871; re-en. Sec. 733, 1st Div. Rev. Stat. 1879; re-en. Sec. 753, 1st Div. Comp. Stat. 1887; re-en. Sec. 1546, C. Civ. Proc. 1895; re-en. Sec. 7025, Rev. C. 1907; re-en. Sec. 9658, R.C.M. 1921; re-en. Sec. 9658, R.C.M. 1935; R.C.M. 1947, 93-6907.

25-31-1107 through 25-31-1110 reserved.

25-31-1111. Collection of judgment against county or county officer. When a judgment is rendered against the county or against any county officer in an action prosecuted against him in his name of office, when the same is to be paid by the county, no execution must issue upon the judgment, but the same must be paid as other county charges. When so collected, the same must be paid by the county treasurer to the proper person to whom the same is adjudged, upon the delivery of a proper voucher therefor.

History: En. Sec. 342, 5th Div. Rev. Stat. 1879; re-en. Sec. 751, 5th Div. Comp. Stat. 1887; amd. Sec. 4199, Pol. C. 1895; re-en. Sec. 2879, Rev. C. 1907; re-en. Sec. 4450, R.C.M. 1921; re-en. Sec. 4450, R.C.M. 1935; R.C.M. 1947, 16-811.

CHAPTER 32

PROCEDURE IN CITY COURTS

Part 1 — General Provisions

Section
25-32-101. Applicability of laws on procedure in justices' courts.
25-32-102. Commencement of action — complaint.
25-32-103. Summons.
25-32-104. Answer and immediate trial.

Part 1

General Provisions

25-32-101. Applicability of laws on procedure in justices' courts. All proceedings in civil actions in city courts must, except as in this chapter otherwise provided, be conducted in the same manner as civil actions in justices' courts.

History: En. Sec. 1703, C. Civ. Proc. 1895; re-en. Sec. 7095, Rev. C. 1907; re-en. Sec. 9728, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 933; re-en. Sec. 9728, R.C.M. 1935; R.C.M. 1947, 93-7804.

25-32-102. Commencement of action — complaint. Civil actions in city courts are commenced by filing a complaint setting forth the violation of the ordinance complained of, with such particulars of time, place, and manner of violation as to enable the defendant to understand distinctly the character of the violation complained of and to answer the complaint. The ordinance may be referred to by its title and section and the number thereof.

History: En. Sec. 1700, C. Civ. Proc. 1895; re-en. Sec. 7092, Rev. C. 1907; re-en. Sec. 9725, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 929; re-en. Sec. 9725, R.C.M. 1935; R.C.M. 1947, 93-7801.

25-32-103. Summons. Immediately after filing the complaint, a summons must be issued, directed to the defendant and returnable either immediately or at any time designated therein, not exceeding 4 days from the date of its issuing.

History: En. Sec. 1701, C. Civ. Proc. 1895; re-en. Sec. 7093, Rev. C. 1907; re-en. Sec. 9726, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 930; re-en. Sec. 9726, R.C.M. 1935; R.C.M. 1947, 93-7802.

25-32-104. Answer and immediate trial. On the return of the summons, the defendant may answer the complaint. The answer may be oral or in writing, and immediately thereafter the case must be tried unless, for good cause shown, an adjournment is granted.

History: En. Sec. 1702, C. Civ. Proc. 1895; re-en. Sec. 7094, Rev. C. 1907; re-en. Sec. 9727, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 931; re-en. Sec. 9727, R.C.M. 1935; R.C.M. 1947, 93-7803.

CHAPTER 33

APPEAL TO DISTRICT COURT FROM JUSTICES' AND CITY COURTS

Part 1 — Filing the Appeal

Section

25-33-101. Exclusive method of review.
25-33-102. Time for appeal.
25-33-103. How appeal taken.
25-33-104. Papers to be transmitted.

Part 2 — Undertaking on Appeal—Stay of Execution

25-33-201. Undertaking on appeal.
25-33-202. Undertaking when prevailing party appeals.
25-33-203. Justification of sureties.
25-33-204. Stay of execution when undertaking filed.
25-33-205. Deposit of money in lieu of undertaking.
25-33-206. Waiver of undertaking or deposit.
25-33-207. Defective undertaking.

Part 3 — Proceedings in District Court

25-33-301. Trial de novo — pleadings, conduct of trial.
25-33-302. Procedure upon reversal on issue of law.
25-33-303. Appeal from judgment by default.
25-33-304. Dismissal of appeal upon delay — costs and damages.
25-33-305. Costs when appeal unsuccessful.
25-33-306. Effect of judgment of district court.

Part 1

Filing the Appeal

25-33-101. Exclusive method of review. A judgment or order in a civil action, except when expressly made final by this code, may be reviewed as prescribed in this chapter and not otherwise. A party aggrieved may appeal in the cases prescribed in this chapter.

History: Ap. p. Sec. 248, p. 94, Bannack Stat.; re-en. Sec. 317, p. 199, L. 1867; re-en. Sec. 366, p. 107, Cod. Stat. 1871; re-en. Sec. 405, p. 149, L. 1877; re-en. Sec. 405, 1st Div. Rev. Stat. 1879; re-en. Sec. 418, 1st Div. Comp. Stat. 1887; re-en. Sec. 1720, C. Civ. Proc. 1895; re-en. Sec. 7096, Rev. C. 1907; re-en. Sec. 9729, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 936; re-en. Sec. 9729, R.C.M. 1935; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966; Sec. 93-8001, R.C.M. 1947; Ap. p. Sec.

248, p. 94, Bannack Stat.; amd. Sec. 319, p. 199, L. 1867; re-en. Sec. 368, p. 107, Cod. Stat. 1871; re-en. Sec. 407, p. 150, L. 1877; re-en. Sec. 407, 1st Div. Rev. Stat. 1879; re-en. Sec. 420, 1st Div. Comp. Stat. 1887; re-en. Sec. 1721, C. Civ. Proc. 1895; re-en. Sec. 7097, Rev. C. 1907; re-en. Sec. 9730, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 938; re-en. Sec. 9730, R.C.M. 1935; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966; Sec. 93-8002, R.C.M. 1947; R.C.M. 1947, 93-8001(part), 93-8002(part).

25-33-102. Time for appeal. Any party dissatisfied with the judgment rendered in a civil action in a city or justice's court may appeal therefrom to the district court of the county at any time within 30 days after the rendition of the judgment.

History: En. Sec. 637, p. 169, Bannack Stat.; re-en. Sec. 742, p. 185, Cod. Stat. 1871; re-en. Sec. 802, 1st Div. Rev. Stat. 1879; re-en. Sec. 822, 1st Div. Comp. Stat. 1887; amd. Sec. 1760, C. Civ. Proc. 1895; re-en. Sec. 7121, Rev. C. 1907; amd. Sec. 1, Ch. 4, L. 1911; re-en. Sec. 9754, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 974; re-en. Sec. 9754, R.C.M. 1935; R.C.M. 1947, 93-7901(part).

25-33-103. How appeal taken. The appeal is taken by serving a copy of the notice of appeal on the adverse party or his attorney and by filing the original notice of appeal with the justice or judge. The order of serving and filing is immaterial.

History: En. Sec. 637, p. 169, Bannack Stat.; re-en. Sec. 742, p. 185, Cod. Stat. 1871; re-en. Sec. 802, 1st Div. Rev. Stat. 1879; re-en. Sec. 822, 1st Div. Comp. Stat. 1887; amd. Sec. 1760, C. Civ. Proc. 1895; re-en. Sec. 7121, Rev. C. 1907; amd. Sec. 1, Ch. 4, L. 1911; re-en. Sec. 9754, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 974; re-en. Sec. 9754, R.C.M. 1935; R.C.M. 1947, 93-7901(part).

25-33-104. Papers to be transmitted. Upon receiving the notice of appeal and filing an undertaking as required in 25-33-201, 25-33-203, and 25-33-205, the justice or judge must, within 10 days, upon the payment of the fees therefor, transmit to the clerk of the district court a certified copy of his docket, the pleadings, all notices, motions, and other papers filed in the cause, the notice of appeal, and the undertaking filed; and the justice or judge may be compelled by the district court, by an order entered upon motion, to transmit such papers and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the justice or judge by the party or his attorney.

History: En. Sec. 639, p. 170, Bannack Stat.; re-en. Sec. 744, p. 186, Cod. Stat. 1871; re-en. Sec. 804, 1st Div. Rev. Stat. 1879; re-en. Sec. 824, 1st Div. Comp. Stat. 1887; en. Sec. 1762, C. Civ. Proc. 1895; re-en. Sec. 7123, Rev. C. 1907; re-en. Sec. 9756, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 977; re-en. Sec. 9756, R.C.M. 1935; R.C.M. 1947, 93-7903.

Part 2

Undertaking on Appeal — Stay of Execution

25-33-201. Undertaking on appeal. (1) An appeal from a justice's or city court is not effectual for any purpose unless an undertaking be filed, with two or more sureties, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money. The undertaking must be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from and all costs if the appeal be withdrawn or dismissed or the amount of any judgment and all costs that may be recovered against him in the action in the district court.

(2) An appeal from a justice's or city court is not effectual for any purpose unless an undertaking be filed, with two or more sureties, in a sum equal to twice the value of the property, including costs, when the judgment is for the recovery of specific personal property. When the action is for the recovery of specific personal property, the undertaking must be conditioned that the appellant will pay the judgment and costs appealed from and obey the order of the court made therein if the appeal be withdrawn or dismissed or pay any judgment and costs that may be recovered against him in said action in the district court and obey any order made by the court therein.

(3) When the judgment appealed from directs the delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that:

(a) during the possession of such property by the appellant, he will not commit or suffer to be committed any waste thereon; and

(b) if the appeal be dismissed or withdrawn or the judgment affirmed or judgment be recovered against him in the action in the district court, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof or he will pay any judgment and costs that may be recovered against him in said action in the district court, not exceeding a sum to be fixed by the justice of the court from which the appeal is to be taken, which sum must be specified in the undertaking.

History: En. Sec. 638, p. 169, Bannack Stat.; re-en. Sec. 743, p. 185, Cod. Stat. 1871; re-en. Sec. 803, 1st Div. Rev. Stat. 1879; re-en. Sec. 823, 1st Div. Comp. Stat. 1887; amd. Sec. 1763, C. Civ. Proc. 1895; en. Sec. 1, Ch. 186, L. 1907; Sec. 7124, Rev. C. 1907; re-en. Sec. 9757, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 978; re-en. Sec. 9757, R.C.M. 1935; R.C.M. 1947, 93-7904(part).

25-33-202. Undertaking when prevailing party appeals. If the party in whose favor the judgment is rendered appeals, the undertaking must be in the sum of $100 and conditioned that he will pay all costs that may be awarded against him and obey any order of court made in the action.

History: En. Sec. 640, p. 170, Bannack Stat.; re-en. Sec. 745, p. 186, Cod. Stat. 1871; re-en. Sec. 805, 1st Div. Rev. Stat. 1879; re-en. Sec. 825, 1st Div. Comp. Stat. 1887; en. Sec. 1764, C. Civ. Proc. 1895; re-en. Sec. 7125, Rev. C. 1907; re-en. Sec. 9758, R.C.M. 1921; re-en. Sec. 9758, R.C.M. 1935; R.C.M. 1947, 93-7905(part).

25-33-203. Justification of sureties. The adverse party may except to the sufficiency of the sureties within 5 days after the filing of the undertaking, and unless they or other sureties justify before the justice or a judge of the district court of the county in which such action has been tried within 5 days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given. The sureties on the undertakings mentioned in this part must justify as provided in 33-26-102.

History: Ap. p. Sec. 638, p. 169, Bannack Stat.; re-en. Sec. 743, p. 185, Cod. Stat. 1871; re-en. Sec. 803, 1st Div. Rev. Stat. 1879; re-en. Sec. 823, 1st Div. Comp. Stat. 1887; amd. Sec. 1763, C. Civ. Proc. 1895; en. Sec. 1, Ch. 186, L. 1907; Sec. 7124, Rev. C. 1907; re-en. Sec. 9757, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 978; re-en. Sec. 9757, R.C.M. 1935; Sec. 93-7904, R.C.M. 1947; Ap. p. Sec. 640, p. 170, Bannack Stat.; re-en. Sec. 745, p. 186, Cod. Stat. 1871; re-en. Sec. 805, 1st Div. Rev. Stat. 1879; re-en. Sec. 825, 1st Div. Comp. Stat. 1887; en. Sec. 1764, C. Civ. Proc. 1895; re-en. Sec. 7125, Rev. C. 1907; re-en. Sec. 9758, R.C.M. 1921; re-en. Sec. 9758, R.C.M. 1935; Sec. 93-7905, R.C.M. 1947; R.C.M. 1947, 93-7904(part), 93-7905(part).

25-33-204. Stay of execution when undertaking filed. If an execution be issued, on the filing of the undertaking, the justice or judge must direct the officer to stay all proceedings on the same. Such officer must, upon the payment of his fees for services rendered on the execution, thereupon relinquish all property levied upon and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees on the execution be not paid, the officer may retain so much of the property or proceeds thereof as may be necessary to pay the same.

History: En. Sec. 642, p. 170, Bannack Stat.; re-en. Sec. 747, p. 186, Cod. Stat. 1871; re-en. Sec. 807, 1st Div. Rev. Stat. 1879; re-en. Sec. 827, 1st Div. Comp. Stat. 1887; amd. Sec. 1765, C. Civ. Proc. 1895; re-en. Sec. 7126, Rev. C. 1907; re-en. Sec. 9759, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 979; re-en. Sec. 9759, R.C.M. 1935; R.C.M. 1947, 93-7906.

25-33-205. Deposit of money in lieu of undertaking. (1) A deposit of the amount of the judgment, including all costs, appealed from or of the value of the property, including all costs, in actions for the recovery of specific personal property, with the justice or judge is equivalent to the filing of the undertaking, and in such cases, the justice or judge must transmit the money to the clerk of the district court to be by him paid out on the order of the court.

(2) In all cases where an undertaking is required on appeal by the provisions of this chapter, a deposit in the court below of the amount of the judgment appealed from and $300 in addition shall be equivalent to filing the undertaking.

History: (1)En. Sec. 638, p. 169, Bannack Stat.; re-en. Sec. 743, p. 185, Cod. Stat. 1871; re-en. Sec. 803, 1st Div. Rev. Stat. 1879; re-en. Sec. 823, 1st Div. Comp. Stat. 1887; amd. Sec. 1763, C. Civ. Proc. 1895; en. Sec. 1, Ch. 186, L. 1907; Sec. 7124, Rev. C. 1907; re-en. Sec. 9757, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 978; re-en. Sec. 9757, R.C.M. 1935; Sec. 93-7904, R.C.M. 1947; (2)En. Sec. 388, p. 112, Cod. Stat. 1871; re-en. Sec. 417, p. 153, L. 1877; re-en. Sec. 417, 1st Div. Rev. Stat. 1879; re-en. Sec. 430, 1st Div. Comp. Stat. 1887; amd. Sec. 1732, C. Civ. Proc. 1895; re-en. Sec. 7108, Rev. C. 1907; re-en. Sec. 9741, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 948; re-en. Sec. 9741, R.C.M. 1935; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966; Sec. 93-8013, R.C.M. 1947; R.C.M. 1947, 93-7904(part), 93-8013(part).

25-33-206. Waiver of undertaking or deposit. In all cases where an undertaking is required on appeal by the provisions of this chapter, the undertaking or deposit may be waived by the written consent of the respondent.

History: En. Sec. 388, p. 112, Cod. Stat. 1871; re-en. Sec. 417, p. 153, L. 1877; re-en. Sec. 417, 1st Div. Rev. Stat. 1879; re-en. Sec. 430, 1st Div. Comp. Stat. 1887; amd. Sec. 1732, C. Civ. Proc. 1895; re-en. Sec. 7108, Rev. C. 1907; re-en. Sec. 9741, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 948; re-en. Sec. 9741, R.C.M. 1935; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966; R.C.M. 1947, 93-8013(part).

25-33-207. Defective undertaking. No appeal shall be dismissed for insufficiency of the undertaking thereon or for any defect or irregularity therein if a good and sufficient undertaking be filed in the district court at or before the hearing of the motion to dismiss the appeal, which undertaking must be approved by the district judge.

History: En. Sec. 1767, C. Civ. Proc. 1895; re-en. Sec. 7128, Rev. C. 1907; re-en. Sec. 9761, R.C.M. 1921; re-en. Sec. 9761, R.C.M. 1935; R.C.M. 1947, 93-7908.

Part 3

Proceedings in District Court

25-33-301. Trial de novo — pleadings, conduct of trial. (1) All appeals from justices' or city courts must be tried anew in the district court on the papers filed in the justice's or city court unless the court, for good cause shown and on such terms as may be just, allow other or amended pleadings to be filed in such action. The court may order new or amended pleadings to be filed. Each party has the benefit of all legal objections made in the justice's or city court.

(2) When the action is tried anew on appeal, the trial must be conducted in all respects as other trials in the district court. The provisions of this code as to trials in the district courts are applicable to trials on appeal in the district court.

History: (1)En. Sec. 641, p. 170, Bannack Stat.; re-en. Sec. 746, p. 186, Cod. Stat. 1871; re-en. Sec. 806, 1st Div. Rev. Stat. 1879; re-en. Sec. 826, 1st Div. Comp. Stat. 1887; amd. Sec. 1761, C. Civ. Proc. 1895; re-en. Sec. 7122, Rev. C. 1907; re-en. Sec. 9755, R.C.M. 1921; re-en. Sec. 9755, R.C.M. 1935; Sec. 93-7902, R.C.M. 1947; (2)En. Sec. 1766, C. Civ. Proc. 1895; re-en. Sec. 7127, Rev. C. 1907; re-en. Sec. 9760, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 980; re-en. Sec. 9760, R.C.M. 1935; Sec. 93-7907, R.C.M. 1947; R.C.M. 1947, 93-7902(part), 93-7907(part).

25-33-302. Procedure upon reversal on issue of law. When a judgment is reversed or set aside on a question of law arising in the justice's or city court, the district court must either try the case anew or render a judgment.

History: En. Sec. 641, p. 170, Bannack Stat.; re-en. Sec. 746, p. 186, Cod. Stat. 1871; re-en. Sec. 806, 1st Div. Rev. Stat. 1879; re-en. Sec. 826, 1st Div. Comp. Stat. 1887; amd. Sec. 1761, C. Civ. Proc. 1895; re-en. Sec. 7122, Rev. C. 1907; re-en. Sec. 9755, R.C.M. 1921; re-en. Sec. 9755, R.C.M. 1935; R.C.M. 1947, 93-7902(part).

25-33-303. Appeal from judgment by default. There is no appeal from a judgment by default rendered in a justice's or city court except on questions of law which appear on the face of the papers or proceedings and except in cases when the justice's or city court has abused its discretion in setting aside or refusing to set aside a default or judgment. If the judgment by default is set aside, the district court must allow pleadings to be filed and try the case.

History: En. Sec. 641, p. 170, Bannack Stat.; re-en. Sec. 746, p. 186, Cod. Stat. 1871; re-en. Sec. 806, 1st Div. Rev. Stat. 1879; re-en. Sec. 826, 1st Div. Comp. Stat. 1887; amd. Sec. 1761, C. Civ. Proc. 1895; re-en. Sec. 7122, Rev. C. 1907; re-en. Sec. 9755, R.C.M. 1921; re-en. Sec. 9755, R.C.M. 1935; R.C.M. 1947, 93-7902(part).

25-33-304. Dismissal of appeal upon delay — costs and damages. For a failure to prosecute an appeal or unnecessary delay in bringing it to a hearing, the district court may order the appeal to be dismissed, with costs; and if it appear to such court that the appeal was made solely for delay, it may add to the costs such damages as may be just, not exceeding 25% of the judgment appealed from.

History: En. Sec. 1766, C. Civ. Proc. 1895; re-en. Sec. 7127, Rev. C. 1907; re-en. Sec. 9760, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 980; re-en. Sec. 9760, R.C.M. 1935; R.C.M. 1947, 93-7907(part).

25-33-305. Costs when appeal unsuccessful. If the party appealing fails to reduce the judgment against him or to enlarge the judgment in his favor appealed from $10 or more or reverse the same in the district court, he shall not recover any costs of appeal.

History: En. Sec. 640, p. 170, Bannack Stat.; re-en. Sec. 745, p. 186, Cod. Stat. 1871; re-en. Sec. 805, 1st Div. Rev. Stat. 1879; re-en. Sec. 825, 1st Div. Comp. Stat. 1887; en. Sec. 1764, C. Civ. Proc. 1895; re-en. Sec. 7125, Rev. C. 1907; re-en. Sec. 9758, R.C.M. 1921; re-en. Sec. 9758, R.C.M. 1935; R.C.M. 1947, 93-7905(part).

25-33-306. Effect of judgment of district court. Judgments rendered in the district court on appeal shall have the same force and effect and may be enforced in the same manner as judgments in actions commenced in the district court.

History: En. Sec. 1766, C. Civ. Proc. 1895; re-en. Sec. 7127, Rev. C. 1907; re-en. Sec. 9760, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 980; re-en. Sec. 9760, R.C.M. 1935; R.C.M. 1947, 93-7907(part).

CHAPTER 34

SMALL CLAIMS PROCEDURE — DISTRICT COURT

Part 1 — General Provisions—Jurisdiction

Section
25-34-101. Purpose — liberal construction.
25-34-102. Jurisdiction — joinder.
25-34-103. Removal from district court.
25-34-104. Venue.
25-34-105. Parties — representation.

Part 2 — Procedure Before Trial

25-34-201. Commencement of actions.
25-34-202. Attachment not available.
25-34-203. Order of court directing defendant to pay or answer claim.
25-34-204. Hearing date.
25-34-205. Service on defendant.
25-34-206. Return of service.
25-34-207. Defendant's counterclaim.
25-34-208. Clerk's fees.

Part 3 — The Trial

25-34-301. Jury — waiver — request.
25-34-302. Proceedings informal — court reporters.
25-34-303. Evidence — subpoena power.

Part 4 — Judgment—Appeal

25-34-401. Entry of judgment.
25-34-402. Costs.
25-34-403. Appeals.
25-34-404. Execution of judgment.

Part 1

General Provisions — Jurisdiction

25-34-101. Purpose — liberal construction. It is the purpose of this chapter to provide a speedy remedy in claims falling hereunder and to promote a forum in which such claims may be heard and disposed of without the necessity of formal trial. For this reason, the provisions hereof should be liberally construed to provide an informal but equitable means of justice, and the small claims court judges are required to assist all parties before them to obtain substantial justice.

History: En. 93-328 by Sec. 7, Ch. 519, L. 1975; R.C.M. 1947, 93-328.

25-34-102. Jurisdiction — joinder. (1) The small claims court has original jurisdiction in all actions for the recovery of money or specific personal property when such action arises out of a contract, express or implied, the amount of the claim, exclusive of costs, does not exceed $1,500, and the defendant can be served within the county or counties for which the small claims court has been created.

(2) More than one claim may be joined if all claims joined would separately meet the requirements for jurisdiction in the small claims court and the total value of money claimed or property sought does not exceed $1,500.

History: En. 93-329 by Sec. 8, Ch. 519, L. 1975; R.C.M. 1947, 93-329(1).

25-34-103. Removal from district court. A district court judge may require any action filed in district court to be removed to the small claims court if the amount in controversy does not exceed $1,500. The small claims court shall hear any action so removed from the district court.

History: En. 93-329 by Sec. 8, Ch. 519, L. 1975; R.C.M. 1947, 93-329(2).

25-34-104. Venue. Proper venue for actions commenced in small claims court is the same as that provided by law for civil actions commenced in district court.

History: En. 93-331 by Sec. 10, Ch. 519, L. 1975; R.C.M. 1947, 93-331.

25-34-105. Parties — representation. (1) Parties in the small claims court may be individuals, partnerships, corporations, unions, associations, or any other kind of organization or entity.

(2) A party may not be represented by an attorney unless all parties are represented by an attorney in a small claims court, except as set forth in subsection (3) herein.

(3) An individual shall represent himself in the small claims court. A partnership shall be represented by a partner or one of its employees. A union shall be represented by a union member or union employee. A corporation shall be represented by one of its employees. An association shall be represented by one of its members or by an employee of the association. Any other kind of organization or entity shall be represented by one of its members or employees.

(4) Only a party, natural or otherwise, who has been a party to the transaction with the defendant for which the claim is brought may file and prosecute a claim in the small claims court.

(5) No party may file an assigned claim in the small claims court.

(6) Notwithstanding any other provision of this section, an executor or administrator of a decedent's estate, a guardian, or a conservator may be a party in the small claims court.

History: En. 93-330 by Sec. 9, Ch. 519, L. 1975; R.C.M. 1947, 93-330.

Part 2

Procedure Before Trial

25-34-201. Commencement of actions. (1) Actions in small claims court shall be commenced by filing an affidavit with the clerk of court. The small claims court judge shall assist any claimant in preparing an affidavit or may direct the clerk of court to provide such assistance.

(2) The clerk of court shall provide forms for the affidavits, which shall be in substantially the following form:

"In the Small Claims Court of the .... Judicial District in and for the County of ...., State of Montana.

Doc. ...... No. ......

..................,
Plaintiff
vs.

..................,
Defendant

PLAINTIFF'S COMPLAINT/
AFFIDAVIT NOTICE TO
DEFENDANT, SEEKING
MONEY DAMAGES

Plaintiff states that defendant(s) owe and should be ordered to pay to me the sum of ...., because on .... (date) at .... (place), the defendant(s)

....

....

Plaintiff declares that the defendant or defendants are not a "person in military service" or "person in the military service of the United States" as defined in Sec. 101 of the Soldiers' and Sailors' Civil Relief Act of 1940.

To the best of my knowledge and belief, the defendant named above resides at the following address or the following is the business address:

....

....

My printed name and printed address are as follows: ....
Signed in my presence Signature: ....
....
Clerk or Deputy Today's date: ....

ORDER OF THE COURT/NOTICE TO DEFENDANT

This claim has been filed against you. You must appear before this court on .... (date) at .... (time) at .... (location).

If you do not appear, a judgment may be entered against you. Costs of the action also may be charged against you. You should read the information on the back of this claim and notice. If you have any questions about the procedure, you may contact the Clerk of the Court in person at .... (location of court) or by telephone at .... (number)

....
Clerk of the Court
By: ....

History: En. 93-326, 93-332 by Secs. 5, 11, Ch. 519, L. 1975; R.C.M. 1947, 93-326(part), 93-332.

25-34-202. Attachment not available. Attachment or prejudgment garnishment is not available in actions brought in small claims court.

History: En. 93-338 by Sec. 17, Ch. 519, L. 1975; R.C.M. 1947, 93-338(part).

25-34-203. Order of court directing defendant to pay or answer claim. (1) Upon filing the affidavit and payment of the fee hereinafter provided, the clerk of court shall cause to be delivered to the sheriff of the county of the defendant's residence a copy of the affidavit together with the original and a copy of an order issued by the court, directed to the defendant, and directing the defendant to pay the claim set forth in the affidavit or deliver up the property described or, in the alternative, to appear and answer the claim set forth in the affidavit.

(2) The order shall:

(a) specify the time, date, and place set for hearing the claim;

(b) state that, if the defendant fails to appear at the hearing and has not satisfied the claim, judgment will be entered against him in the amount or for the relief claimed, for costs; and

(c) be signed by the clerk of court and bear the seal of the court.

History: En. 93-333 by Sec. 12, Ch. 519, L. 1975; R.C.M. 1947, 93-333.

25-34-204. Hearing date. The date for the appearance of the defendant to be set forth in the order shall be determined by the clerk of court in accordance with rules adopted by the small claims judge and shall not be more than 30 or less than 10 days from the date of the order. Service of the order and copy of the affidavit shall be made upon the defendant not less than 7 days prior to the date set for his appearance by the order. If the order is not timely served, plaintiff may have a new appearance date set by the clerk and a new order issued and delivered to the sheriff, and, if necessary, repeated orders may be issued at any time within 1 year after the commencement of the action.

History: En. 93-335 by Sec. 14, Ch. 519, L. 1975; R.C.M. 1947, 93-335.

25-34-205. Service on defendant. The original order shall be shown to the defendant and a copy of it along with a copy of the affidavit shall be served upon the defendant by the sheriff in the same manner provided by law for service of process in civil actions in district court. The provisions of law relating to sheriff's fees are applicable to this section.

History: En. 93-334 by Sec. 13, Ch. 519, L. 1975; R.C.M. 1947, 93-334.

25-34-206. Return of service. The sheriff, after effecting service, shall make return upon the original order and file it with the clerk of court.

History: En. 93-336 by Sec. 15, Ch. 519, L. 1975; R.C.M. 1947, 93-336.

25-34-207. Defendant's counterclaim. (1) If the defendant wishes to assert a counterclaim against the plaintiff, he shall file a written answer setting forth his counterclaim against the plaintiff and shall cause the answer to be served upon the plaintiff not less than 72 hours before the date set for the hearing. Service shall be made in the same manner in which service is made upon the defendant.

(2) A counterclaim or setoff may not exceed $1,500. If a counterclaim or setoff is asserted in excess of $1,500, the jurisdiction of the small claims court over the plaintiff's claim is not defeated, but the court shall limit its determination of the counterclaim or setoff to the question of whether plaintiff's claim is discharged thereby, leaving defendant to prosecute the balance of his claim in appropriate district court action.

History: En. 93-337 by Sec. 16, Ch. 519, L. 1975; R.C.M. 1947, 93-337.

25-34-208. Clerk's fees. (1) The clerk of court shall collect a fee of $5:

(a) from the plaintiff upon the filing of the affidavit;

(b) from the defendant upon the filing of a written answer.

(2) The laws relating to paupers' affidavits apply to actions before the small claims courts.

History: En. 93-344 by Sec. 23, Ch. 519, L. 1975; R.C.M. 1947, 93-344(1), (2).

Part 3

The Trial

25-34-301. Jury — waiver — request. The plaintiff, by filing the affidavit for a proceeding in small claims court, waives the right to jury trial. Defendant may request a jury, provided such request is made not less than 48 hours prior to the date set for hearing. If defendant pleads a counterclaim or setoff, he too waives a jury trial. If a jury is requested, it shall be impaneled in the same fashion as provided for district court juries in civil cases involving less than $10,000.

History: En. 93-340 by Sec. 19, Ch. 519, L. 1975; R.C.M. 1947, 93-340.

25-34-302. Proceedings informal — court reporters. (1) If the action is tried to the court, the proceedings shall be informal to the extent possible in order to dispense speedy justice to the parties. A reporter is not necessary unless the judge finds the issues sufficiently complex that a record is desirable, in which case he shall make arrangements with a court reporter of the district court to take the testimony. The judge shall make findings of fact sufficient to establish in full the basis of his judgment and shall file them with his judgment.

(2) If a jury is impaneled, it shall try all issues of fact, and in such case there shall be a court reporter.

History: En. 93-339 by Sec. 18, Ch. 519, L. 1975; R.C.M. 1947, 93-339.

25-34-303. Evidence — subpoena power. Both parties have the right to offer evidence, written and oral, and the judge may direct the production of evidence as he deems appropriate. The small claims court has the subpoena power granted to district courts in civil cases.

History: En. 93-341 by Sec. 20, Ch. 519, L. 1975; R.C.M. 1947, 93-341.

Part 4

Judgment — Appeal

25-34-401. Entry of judgment. Upon the conclusion of a case tried to the court, the judge shall make his findings and enter judgment. Judgment shall be entered upon a jury verdict in the same manner as is provided for district court jury trials.

History: En. 93-342 by Sec. 21, Ch. 519, L. 1975; R.C.M. 1947, 93-342.

25-34-402. Costs. The prevailing party in an action before the small claims court is entitled to costs.

History: En. 93-344 by Sec. 23, Ch. 519, L. 1975; R.C.M. 1947, 93-344(3).

25-34-403. Appeals. (1) If either party is dissatisfied with the judgment of the small claims court, he may appeal to the district court of the county where the judgment was rendered in the same fashion as appeals in other civil actions. Any such appeal shall be tried de novo.

(2) In the event that the parties are represented by counsel on appeal, the judge may grant the prevailing party, in addition to costs, reasonable attorney fees.

History: En. 93-343 by Sec. 22, Ch. 519, L. 1975; R.C.M. 1947, 93-343.

25-34-404. Execution of judgment. Proceedings to enforce or collect a judgment are governed by the laws relating to executions upon district court judgments.

History: En. 93-338 by Sec. 17, Ch. 519, L. 1975; R.C.M. 1947, 93-338(part).

CHAPTER 35

SMALL CLAIMS PROCEDURE — JUSTICE'S COURT

Part 1 — General Provisions—Jurisdiction

Section

25-35-101. Purpose.
25-35-102. Jurisdiction.
25-35-103. Removal from district court.
25-35-104. Venue.
25-35-105. Parties — representation.

Part 2 — Procedure Before Trial

25-35-201. Commencement of action.
25-35-202. Form of complaint and order of court/notice to defendant.
25-35-203. Hearing date.
25-35-204. Service on defendant.
25-35-205. Return of service.
25-35-206. No further pleadings.
25-35-207. Fees.

Part 3 — The Trial

25-35-301. Proceedings to be informal.
25-35-302. Witnesses — evidence — subpoena power.
25-35-303. Record of proceedings.

Part 4 — Judgment—Appeal

25-35-401. Entry of judgment.
25-35-402. Costs.
25-35-403. Appeal to district court — commencement and scope of.
25-35-404. Record on appeal.
25-35-405. Use of transcripts or tapes by district court.
25-35-406. Execution of judgment.

Part 1

General Provisions — Jurisdiction

25-35-101. Purpose. It is the purpose of this chapter to provide a speedy remedy for small claims and to promote a forum in which such claims may be heard and disposed of without the necessity of a formal trial.

History: En. 93-345 by Sec. 1, Ch. 572, L. 1977; R.C.M. 1947, 93-345.

25-35-102. Jurisdiction. The small claims court has jurisdiction over all actions for the recovery of money or specific personal property when the amount claimed does not exceed $750, exclusive of costs, and the defendant can be served within the county where the action is commenced.

History: En. 93-347 by Sec. 3, Ch. 572, L. 1977; R.C.M. 1947, 93-347(1).

25-35-103. Removal from district court. A district court judge may require any action filed in district court to be removed to the small claims court if the amount in controversy does not exceed $500. The small claims court shall hear any action so removed from the district court.

History: En. 93-347 by Sec. 3, Ch. 572, L. 1977; R.C.M. 1947, 93-347(2).

25-35-104. Venue. Proper venue for actions commenced in the small claims court is the same as that provided by law for civil actions commenced in justice's court.

History: En. 93-348 by Sec. 4, Ch. 572, L. 1977; R.C.M. 1947, 93-348.

25-35-105. Parties — representation. (1) Parties in the small claims court may be individuals, partnerships, corporations, unions, associations, or any other kind of organization or entity.

(2) A party may not be represented by an attorney unless all parties are represented by an attorney in a small claims court.

(3) An individual may represent himself in a small claims court. A partnership may be represented by a partner or one of its employees. A union may be represented by a union member or union employee. A corporation may be represented by one of its employees. An association may be represented by one of its members or by an employee of the association. Any other kind of organization or entity may be represented by one of its members or employees.

(4) Only a party, natural or otherwise, who has been a party to the transaction with the defendant for which the claim is brought may file and prosecute a claim in the small claims court.

(5) No party may file an assigned claim in the small claims court.

(6) No party may file more than three claims in any calendar year.

(7) Notwithstanding any other provision of this section, a personal representative of a decedent's estate, a guardian, or a conservator may be a party in the small claims court.

History: En. 93-354 by Sec. 10, Ch. 572, L. 1977; R.C.M. 1947, 93-354.

Part 2

Procedure Before Trial

25-35-201. Commencement of action. (1) A small claims action is commenced whenever any person appears before a justice of the peace and executes a sworn small claims complaint in substantially the same form as set forth in 25-35-202.

(2) The justice shall assist any claimant in preparing his complaint or instruct his clerk to provide such assistance.

History: En. 93-349, 93-361 by Secs. 5, 17, Ch. 572, L. 1977; R.C.M. 1947, 93-349(part), 93-361(1).

25-35-202. Form of complaint and order of court/notice to defendant. The sworn complaint and order of the court shall be made on a blank substantially in the following form:

IN THE SMALL CLAIMS DIVISION OF THE JUSTICE'S
COURT OF .... COUNTY, MONTANA
BEFORE ...., JUSTICE OF THE PEACE

....

.... Plaintiff, vs. .... Defendant(s)	}	Complaint Case No. .....

....

Comes now the plaintiff, being first duly sworn, upon oath, and complains and alleges that defendant is indebted to plaintiff in the sum of $......, for ....
....
....
which sum is now due, owing, and unpaid despite demands for the payment thereof, together with plaintiff's costs herein expended.

Dated this ...... day of ...., 19....

....
Plaintiff
....
Plaintiff's address

Subscribed and sworn to before me this ...... day of ...., 19....

....
Justice of the peace
By: ....
Clerk, small claims division

ORDER OF COURT/
NOTICE TO DEFENDANT

THE STATE OF MONTANA TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby directed to appear and answer the within and foregoing complaint at:

....
....
on................ at ....
Reset for .... at ....
Reset for .... at ....
Reset for .... at ....

and to have with you, then and there, all books, papers, and witnesses needed by you to establish your defense to the claim; and you are further notified that in case you do not appear, judgment will be taken against you by default for the relief demanded in the complaint and for costs of this action, including costs of service of the complaint and order of the court/notice to defendant.

To the Sheriff, Constable, or Server of process of said county, greetings:

Make legal service and due return thereof on the defendant at ....

Dated this .... day of ...., 19....

....
Justice of the peace
By: ....
Clerk of small claims division

History: **En. 93-350 by Sec. 6, Ch. 572, L. 1977; R.C.M. 1947, 93-350.**

25-35-203. Hearing date. The date for the appearance of the defendant to be set forth in the order shall be determined by the justice of the peace or by his clerk in accordance with rules adopted by the justice of the peace and may not be more than 20 or less than 10 days from the date of the order. Service of the order and a copy of the sworn complaint shall be made upon the defendant not less than 5 days prior to the date set for his appearance by the order. If the order is not timely served, the plaintiff may have a new appearance date set by the justice of the peace or his clerk and a new order issued and delivered to the sheriff, constable, or other process server. If necessary, repeated orders may be issued at any time within 1 year after the commencement of the action.

History: En. 93-352 by Sec. 8, Ch. 572, L. 1977; R.C.M. 1947, 93-352.

25-35-204. Service on defendant. The original of the order and notice shall be shown to the defendant, and a copy of it along with a copy of the sworn complaint shall be served upon the defendant by the sheriff, constable, or other process server in the same manner provided by law for service of process in civil actions in justice's court. The provisions of law relating to sheriff's fees are applicable to this section.

History: En. 93-351 by Sec. 7, Ch. 572, L. 1977; R.C.M. 1947, 93-351.

25-35-205. Return of service. The sheriff, constable, or other process server shall, after affecting service, return the original order to the justice of the peace or his clerk.

History: En. 93-353 by Sec. 9, Ch. 572, L. 1977; R.C.M. 1947, 93-353.

25-35-206. No further pleadings. No form of pleading other than the complaint and the order of the court/notice to defendant is allowed.

History: En. 93-349 by Sec. 5, Ch. 572, L. 1977; R.C.M. 1947, 93-349(part).

25-35-207. Fees. (1) The clerk of the justice's court shall collect a fee of $3.50:

(a) from the plaintiff upon the filing of the sworn complaint; and

(b) from the defendant upon his appearance and contesting of the complaint.

(2) The laws relating to paupers' affidavits apply to actions before the small claims court.

History: En. 93-364 by Sec. 20, Ch. 572, L. 1977; R.C.M. 1947, 93-364(1), (2).

Part 3

The Trial

25-35-301. Proceedings to be informal. The hearing and disposition of small claims actions shall be informal.

History: En. 93-349 by Sec. 5, Ch. 572, L. 1977; R.C.M. 1947, 93-349(part).

25-35-302. Witnesses — evidence — subpoena power. The plaintiff and the defendant may offer evidence in their behalf by witnesses appearing at such hearing in the same manner as in other cases arising in justice's court or by written evidence, and the judge may direct the production of evidence as he considers appropriate. The small claims court has the subpoena power granted to justices' courts in all civil cases.

History: En. 93-355 by Sec. 11, Ch. 572, L. 1977; R.C.M. 1947, 93-355.

25-35-303. Record of proceedings. All civil actions tried in a small claims court shall be recorded either electronically or stenographically.

History: En. 93-356 by Sec. 12, Ch. 572, L. 1977; R.C.M. 1947, 93-356.

Part 4

Judgment — Appeal

25-35-401. Entry of judgment. Upon the conclusion of the case tried to the court, the justice shall make his findings and enter judgment.

History: En. 93-362 by Sec. 18, Ch. 572, L. 1977; R.C.M. 1947, 93-362.

25-35-402. Costs. The prevailing party in an action before the small claims court is entitled to his costs.

History: En. 93-364 by Sec. 20, Ch. 572, L. 1977; R.C.M. 1947, 93-364(3).

25-35-403. Appeal to district court — commencement and scope of. (1) If either party is dissatisfied with the judgment of the small claims court, he may appeal to the district court of the county where the judgment was rendered. An appeal shall be commenced by giving written notice to the small claims court and serving a copy of the notice of appeal on the adverse party within 10 days after entry of judgment.

(2) There shall not be a trial de novo in the district court. The appeal shall be limited to questions of law.

History: En. 93-357 by Sec. 13, Ch. 572, L. 1977; R.C.M. 1947, 93-357(part).

25-35-404. Record on appeal. (1) Within 30 days of the notice, the entire record of the small claims court proceedings shall be transmitted to the district court or the appeal shall be dismissed. It is the duty of the appealing party to perfect the appeal.

(2) When notice of appeal is filed, the justice shall forward the electronic recording or transcript of the stenographic record of the proceedings to the district court, together with the original papers filed, certified by him to be accurate and complete. When the record is transferred to the clerk of the district court, the justice shall notify the parties in writing.

History: En. 93-357, 93-358 by Secs. 13, 14, Ch. 572, L. 1977; R.C.M. 1947, 93-357(part), 93-358.

25-35-405. Use of transcripts or tapes by district court. The district court may hear the recording of the proceedings of the justice's court, but in its discretion it may have parts or all of the recordings transcribed at the cost of the district court. If the proceedings are stenographically taken, the notes will be transcribed in full or in designated parts as stipulated by the parties. The cost of such transcription shall be computed as prescribed by law.

History: En. 93-359 by Sec. 15, Ch. 572, L. 1977; R.C.M. 1947, 93-359.

25-35-406. Execution of judgment. Proceedings to enforce or collect a judgment are governed by the laws relating to execution upon justice's court judgments.

History: En. 93-363 by Sec. 19, Ch. 572, L. 1977; R.C.M. 1947, 93-363.

TITLE 26

EVIDENCE

Ch.
1. Statutory Provisions on Evidence.
2. Subpoenas and Witnesses.
3. Effect of Former Judgments and Orders.
Chapters 4 through 9 reserved.
10. Montana Rules of Evidence.

CHAPTER 1

STATUTORY PROVISIONS ON EVIDENCE

Part 1 — Definitions and Miscellaneous Provisions

Section
26-1-101. General definitions.
26-1-102. Definitions — kinds of evidence.
26-1-103. Declaration, act, or omission which is a part of the transaction.
26-1-104. Evidence of third person's obligation.
26-1-105. Opinion evidence as to sanity.
26-1-106. Explanation of alterations in a writing.
26-1-107. When adverse party's admission of execution of a writing sufficient.

Part 2 — Province of Court and Jury

26-1-201. Questions of law.
26-1-202. Questions of fact.
26-1-203. Who to judge effect or value of evidence.

Part 3 — Weight and Effect of Evidence

26-1-301. One witness sufficient to prove a fact.
26-1-302. Witness presumed to speak the truth.
26-1-303. Instructions to jury on how to evaluate evidence.

Part 4 — Burdens of Proof

26-1-401. Who has the burden of producing evidence.
26-1-402. Who has the burden of persuasion.
26-1-403. Instructions to jury on standard of proof required to meet burden of persuasion.

Part 5 — Inferences

26-1-501. Inference defined.
26-1-502. When an inference arises.

Part 6 — Presumptions

26-1-601. Complete list of conclusive presumptions.
26-1-602. Definition and examples of disputable presumptions.
26-1-603. Books containing laws presumed correct.

26-1-604. When recitals in statutes conclusive.
26-1-605. Entries in official books and records prima facie evidence.
26-1-606. Entry made by officer or board prima facie evidence.
26-1-607. When writings of a decedent prima facie evidence.
Sections 26-1-608 through 26-1-620 reserved.
26-1-621. Finding of presumed death under federal Missing Persons Act prima facie evidence.
26-1-622. Official reports and records made pursuant to federal law prima facie evidence.
26-1-623. Presumption of authenticity of finding, report, or record.

Part 7 — Voluntary Payment of Claims

26-1-701. Legislative policy.
26-1-702. Person defined.
26-1-703. Voluntary partial payment of claim not an admission of fault or waiver.
26-1-704. Fact of payment and amount inadmissible as evidence.
26-1-705. Effect of payment upon final settlement.
26-1-706. Effect of payment on judgment.

Part 8 — Privileges

26-1-801. Policy to protect confidentiality in certain relations.
26-1-802. Spousal privilege.
26-1-803. Attorney-client privilege.
26-1-804. Confessions made to member of clergy.
26-1-805. Doctor-patient privilege.
26-1-806. Speech pathologist, audiologist-client privilege.
26-1-807. Psychologist-client privilege.
26-1-808. Information gathered by psychology teachers and observers.
26-1-809. Confidential communications by student to employee of educational institution.
26-1-810. Confidential communications made to public officer.

Part 9 — Reporters' Confidence Act

26-1-901. Short title.
26-1-902. Extent of reporters' privilege.
26-1-903. Waiver of privilege.

Part 10 — Affidavits

26-1-1001. Affidavit defined.
26-1-1002. Permissible uses for affidavits.
26-1-1003. Affidavits made in this state — before whom taken.
26-1-1004. Affidavits made in another state — before whom taken.
26-1-1005. Affidavits made in foreign country — before whom taken.
26-1-1006. Verification of affidavit taken out of state.
Sections 26-1-1007 through 26-1-1010 reserved.
26-1-1011. Affidavit of printer or publisher as evidence of publication.
26-1-1012. Affidavit of publication — where filed, prima facie evidence.

Part 1

Definitions and Miscellaneous Provisions

26-1-101. General definitions. (1) The examination of a witness by the party producing him is denominated the "direct examination"; the examination of the same witness upon the same matter by the adverse party, the "cross-examination". The direct examination must be completed before the cross-examination begins unless the court otherwise directs.

(2) "Judicial evidence" is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

(3) A question which suggests to the witness the answer which the examining party desires is denominated a "leading question" or "suggestive question". On a direct examination leading questions are not allowed, except in the sound discretion of the court under special circumstances making it appear that the interests of justice require it.

(4) "Proof" is the effect of evidence, the establishment of a fact by evidence.

(5) A "witness" is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit.

History: (1)En. Sec. 3373, C. Civ. Proc. 1895; re-en. Sec. 8018, Rev. C. 1907; re-en. Sec. 10662, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2045; re-en. Sec. 10662, R.C.M. 1935; Sec. 93-1901-4, R.C.M. 1947; (2)En. Sec. 3100, C. Civ. Proc. 1895; re-en. Sec. 7844, Rev. C. 1907; re-en. Sec. 10488, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1823; re-en. Sec. 10488, R.C.M. 1935; Sec. 93-301-1, R.C.M. 1947; (3)En. Sec. 3374, C. Civ. Proc. 1895; re-en. Sec. 8019, Rev. C. 1907; re-en. Sec. 10663, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2046; re-en. Sec. 10663, R.C.M. 1935; Sec. 93-1901-5, R.C.M. 1947; (4)En. Sec. 3101, C. Civ. Proc. 1895; re-en. Sec. 7845, Rev. C. 1907; re-en. Sec. 10489, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1824; re-en. Sec. 10489, R.C.M. 1935; Sec. 93-301-2, R.C.M. 1947; (5)En. Sec. 3160, C. Civ. Proc. 1895; re-en. Sec. 7889, Rev. C. 1907; re-en. Sec. 10533, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1878; re-en. Sec. 10533, R.C.M. 1935; Sec. 93-701-1, R.C.M. 1947; R.C.M. 1947, 93-301-1, 93-301-2, 93-701-1, 93-1901-4, 93-1901-5.

26-1-102. Definitions — kinds of evidence. (1) (a) "Conclusive evidence" or "unanswerable evidence" is that which the law does not permit to be contradicted. For example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it.

(b) No evidence is by law made conclusive or unanswerable unless so declared by this code.

(2) "Cumulative evidence" is additional evidence of the same character to the same point.

(3) "Direct evidence" is that which proves the fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example, if the fact in dispute be an agreement, the evidence of a witness who was present and witnessed the making of it is direct.

(4) (a) "Indirect evidence" is that which tends to establish the fact in dispute by proving another and which, though true, does not of itself conclusively establish that fact but affords an inference or presumption of its existence. For example, a witness proves an admission of the party to the fact in dispute. This proves a fact from which the fact in dispute is inferred.

(b) Indirect evidence is of two kinds:

(i) inferences; and

(ii) presumptions.

(5) "Prima facie evidence" is that which suffices for the proof of a particular fact until contradicted and overcome by other evidence. For example, the certificate of a recording officer is prima facie evidence of a record, but it may afterward be rejected upon proof that there is no such record.

History: (1)(a)En. Sec. 3114, C. Civ. Proc. 1895; re-en. Sec. 7858, Rev. C. 1907; re-en. Sec. 10502, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1837; re-en. Sec. 10502, R.C.M. 1935; Sec. 93-301-15, R.C.M. 1947; (1)(b)En. Sec. 3280, C. Civ. Proc. 1895; re-en. Sec. 7971, Rev. C. 1907; re-en. Sec. 10615, R.C.M. 1921; Cal. C. Civ. Proc.

Sec. 1978; re-en. Sec. 10615, R.C.M. 1935; Sec. 93-1401-9, R.C.M. 1947; (2)En. Sec. 3115, C. Civ. Proc. 1895; re-en. Sec. 7859, Rev. C. 1907; re-en. Sec. 10503, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1838; re-en. Sec. 10503, R.C.M. 1935; Sec. 93-301-16, R.C.M. 1947; (3)En. Sec. 3108, C. Civ. Proc. 1895; re-en. Sec. 7852, Rev. C. 1907; re-en. Sec. 10496, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1831; re-en. Sec. 10496, R.C.M. 1935; Sec. 93-301-9, R.C.M. 1947; (4)(a)En. Sec. 3109, C. Civ. Proc. 1895; re-en. Sec. 7853, Rev. C. 1907; re-en. Sec. 10497, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1832; re-en. Sec. 10497, R.C.M. 1935; Sec. 93-301-10, R.C.M. 1947; (4)(b)En. Sec. 3260, C. Civ. Proc. 1895; re-en. Sec. 7956, Rev. C. 1907; re-en. Sec. 10600, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1957; re-en. Sec. 10600, R.C.M. 1935; Sec. 93-1301-1, R.C.M. 1947 (5)En. Sec. 3110, C. Civ. Proc. 1895; re-en. Sec. 7854, Rev. C. 1907; re-en. Sec. 10498, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1833; re-en. Sec. 10498, R.C.M. 1935; Sec. 93-301-11, R.C.M. 1947; R.C.M. 1947, 93-301-9, 93-301-10, 93-301-11, 93-301-15, 93-301-16, 93-1301-1, 93-1401-9.

26-1-103. Declaration, act, or omission which is a part of the transaction. Where the declaration, act, or omission forms part of a transaction which is itself the fact in dispute or evidence of that fact, such declaration, act, or omission is evidence as part of the transaction.

History: En. Sec. 604, p. 196, L. 1877; re-en. Sec. 604, 1st Div. Rev. Stat. 1879; re-en. Sec. 622, 1st Div. Comp. Stat. 1887; re-en. Sec. 3126, C. Civ. Proc. 1895; re-en. Sec. 7867, Rev. C. 1907; re-en. Sec. 10511, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1850; re-en. Sec. 10511, R.C.M. 1935; R.C.M. 1947, 93-401-7.

26-1-104. Evidence of third person's obligation. Where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties.

History: En. Sec. 605, p. 197, L. 1877; re-en. Sec. 605, 1st Div. Rev. Stat. 1879; re-en. Sec. 623, 1st Div. Comp. Stat. 1887; re-en. Sec. 3127, C. Civ. Proc. 1895; re-en. Sec. 7868, Rev. C. 1907; re-en. Sec. 10512, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1851; re-en. Sec. 10512, R.C.M. 1935; R.C.M. 1947, 93-401-8.

26-1-105. Opinion evidence as to sanity. In conformity with the [preceding provisions], upon a trial evidence may be given of the opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer and the opinion of intimate acquaintanceship respecting the mental sanity of a person, the reason for the opinion being given.

History: En. Sec. 624, p. 201, L. 1877; re-en. Sec. 624, 1st Div. Rev. Stat. 1879; re-en. Sec. 642, 1st Div. Comp. Stat. 1887; re-en. Sec. 3146, C. Civ. Proc. 1895; re-en. Sec. 7887, Rev. C. 1907; re-en. Sec. 10531, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1870; re-en. Sec. 10531, R.C.M. 1935; R.C.M. 1947, 93-401-27(part)(10).

26-1-106. Explanation of alterations in a writing. The party producing a writing as genuine which has been altered or appears to have been altered after its execution in a part material to the question in dispute must account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, was made with the consent of the parties affected by it, or was otherwise properly or innocently made or that the alteration did not change the meaning or language of the instrument. If he does that, he may give the writing in evidence, but not otherwise.

History: En. Sec. 365, p. 119, Bannack Stat.; re-en. Sec. 423, p. 221, L. 1867; re-en. Sec. 497, p. 136, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 12, p. 12, L. 1881; re-en. Sec. 644, 1st Div. Comp. Stat. 1887; amd. Sec. 3291, C. Civ. Proc. 1895; re-en. Sec. 7973, Rev. C. 1907; re-en. Sec. 10617, R.C.M. 1921;

Cal. C. Civ. Proc. Sec. 1982; re-en. Sec. 10617, R.C.M. 1935; R.C.M. 1947, 93-1501-2.

26-1-107. When adverse party's admission of execution of a writing sufficient. Where evidence is given that the party against whom a writing is offered has at any time admitted its execution, no other evidence of the execution need be given when the instrument is one mentioned in [93-1101-16] or one produced from the custody of the adverse party and has been acted upon by him as genuine.

History: En. Sec. 3233, C. Civ. Proc. 1895; re-en. Sec. 7946, Rev. C. 1907; re-en. Sec. 10590, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1942; re-en. Sec. 10590, R.C.M. 1935; R.C.M. 1947, 93-1101-13.

Part 2

Province of Court and Jury

26-1-201. Questions of law. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this code, made evidence of a fact, the court is to declare such knowledge to the jury, which is bound to accept it.

History: En. Sec. 3441, C. Civ. Proc. 1895; re-en. Sec. 8055, Rev. C. 1907; re-en. Sec. 10699, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2102; re-en. Sec. 10699, R.C.M. 1935; R.C.M. 1947, 93-2501-2.

26-1-202. Questions of fact. All questions of fact, where the trial is by jury, other than those mentioned in 26-1-201 are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this code.

History: En. Sec. 3440, C. Civ. Proc. 1895; re-en. Sec. 8054, Rev. C. 1907; re-en. Sec. 10698, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2101; re-en. Sec. 10698, R.C.M. 1935; R.C.M. 1947, 93-2501-1.

26-1-203. Who to judge effect or value of evidence. The jury, subject to the control of the court, in the cases specified in this code, is the judge of the effect or value of evidence addressed to it, except when the evidence is declared to be conclusive.

History: En. Sec. 3390, C. Civ. Proc. 1895; re-en. Sec. 8028, Rev. C. 1907; re-en. Sec. 10672, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2061; re-en. Sec. 10672, R.C.M. 1935; R.C.M. 1947, 93-2001-1(part).

Part 3

Weight and Effect of Evidence

26-1-301. One witness sufficient to prove a fact. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason.

History: En. Sec. 598, p. 195, L. 1877; re-en. Sec. 598, 1st Div. Rev. Stat. 1879; re-en. Sec. 616, 1st Div. Comp. Stat. 1887; re-en. Sec. 3120, C. Civ. Proc. 1895;

re-en. Sec. 7861, Rev. C. 1907; re-en. Sec. 10505, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1844; re-en. Sec. 10505, R.C.M. 1935; R.C.M. 1947, 93-401-1.

26-1-302. Witness presumed to speak the truth. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, by evidence affecting his motives or his character for truth, honesty, or integrity, or by contradictory evidence; and the jury is the exclusive judge of his credibility.

History: En. Sec. 601, p. 195, L. 1877; re-en. Sec. 601, 1st Div. Rev. Stat. 1879; re-en. Sec. 619, 1st Div. Comp. Stat. 1887; re-en. Sec. 3123, C. Civ. Proc. 1895; re-en. Sec. 7864, Rev. C. 1907; re-en. Sec. 10508, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1847; re-en. Sec. 10508, R.C.M. 1935; R.C.M. 1947, 93-401-4.

26-1-303. Instructions to jury on how to evaluate evidence. The jury is to be instructed by the court on all proper occasions:

(1) that their power of judging of the effect of evidence is not arbitrary but to be exercised with legal discretion and in subordination to the rules of evidence;

(2) that they are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds;

(3) that a witness false in one part of his testimony is to be distrusted in others;

(4) that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution;

(5) that evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and therefore

(6) that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

History: En. Sec. 3390, C. Civ. Proc. 1895; re-en. Sec. 8028, Rev. C. 1907; re-en. Sec. 10672, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2061; re-en. Sec. 10672, R.C.M. 1935; R.C.M. 1947, 93-2001-1(part)(1) thru (4), (6), (7).

Part 4

Burdens of Proof

26-1-401. Who has the burden of producing evidence. The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.

History: En. Sec. 3290, C. Civ. Proc. 1895; re-en. Sec. 7972, Rev. C. 1907; re-en. Sec. 10616, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1981; re-en. Sec. 10616, R.C.M. 1935; R.C.M. 1947, 93-1501-1.

26-1-402. Who has the burden of persuasion. Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action is founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party.

History: En. Sec. 623, p. 201, L. 1877; re-en. Sec. 623, 1st Div. Rev. Stat. 1879; re-en. Sec. 641, 1st Div. Comp. Stat. 1887; re-en. Sec. 3145, C. Civ. Proc. 1895;

re-en. Sec. 7886, Rev. C. 1907; re-en. Sec. 10530, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1869; re-en. Sec. 10530, R.C.M. 1935; R.C.M. 1947, 93-401-26.

26-1-403. Instructions to jury on standard of proof required to meet burden of persuasion. The jury is to be instructed by the court on all proper occasions:

(1) that in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of the evidence; and

(2) that in criminal cases guilt must be established beyond reasonable doubt.

History: En. Sec. 3390, C. Civ. Proc. 1895; re-en. Sec. 8028, Rev. C. 1907; re-en. Sec. 10672, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2061; re-en. Sec. 10672, R.C.M. 1935; R.C.M. 1947, 93-2001-1(part).

Part 5

Inferences

26-1-501. Inference defined. An "inference" is a deduction which the reason of the jury makes from the facts proved, without an express direction of the law to that effect.

History: En. Sec. 3261, C. Civ. Proc. 1895; re-en. Sec. 7957, Rev. C. 1907; re-en. Sec. 10601, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1958; re-en. Sec. 10601, R.C.M. 1935; R.C.M. 1947, 93-1301-2.

26-1-502. When an inference arises. An inference must be founded:

(1) on a fact legally proved; and

(2) on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

History: En. Sec. 3263, C. Civ. Proc. 1895; re-en. Sec. 7959, Rev. C. 1907; re-en. Sec. 10603, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1960; re-en. Sec. 10603, R.C.M. 1935; R.C.M. 1947, 93-1301-4.

Part 6

Presumptions

26-1-601. Complete list of conclusive presumptions. The following presumptions and no others are deemed conclusive:

(1) a malicious and guilty intent, from the deliberate commission of an unlawful act for the purpose of injuring another;

(2) the truth of the facts recited, from the recital in a written instrument between the parties thereto or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration;

(3) whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he cannot in any litigation arising out of such declaration, act, or omission be permitted to falsify it;

(4) a tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation;

(5) the issue of a wife cohabiting with her husband who is not impotent is indisputably presumed to be legitimate;

(6) the judgment or order of a court, when declared by this code to be conclusive; but such judgment or order must be alleged in the pleadings if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence;

(7) any other presumption which, by statute, is expressly made conclusive.

History: En. Sec. 3265, C. Civ. Proc. 1895; re-en. Sec. 7961, Rev. C. 1907; re-en. Sec. 10605, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1962; re-en. Sec. 10605, R.C.M. 1935; R.C.M. 1947, 93-1301-6.

26-1-602. Definition and examples of disputable presumptions. All other presumptions are satisfactory if uncontradicted. They are denominated "disputable presumptions" and may be controverted by other evidence. The following are of that kind:

(1) that a person is innocent of crime or wrong;

(2) that an unlawful act was done with an unlawful intent;

(3) that a person intends the ordinary consequence of his voluntary act;

(4) that a person takes ordinary care of his own concerns;

(5) that evidence willfully suppressed would be adverse if produced;

(6) that higher evidence would be adverse from inferior, being produced;

(7) that money paid by one to another was due to the latter;

(8) that a thing delivered by one to another belonged to the latter;

(9) that an obligation delivered up to the debtor has been paid;

(10) that former rent or installments have been paid when a receipt for latter is produced;

(11) that things which a person possesses are owned by him;

(12) that a person is the owner of property from exercising acts of ownership over it or from common reputation of his ownership;

(13) that a person in possession of an order on himself for the payment of money, on the delivery of a thing, has paid the money or delivered the thing accordingly;

(14) that a person acting in a public office was regularly appointed to it;

(15) that official duty has been regularly performed;

(16) that a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of its or his jurisdiction;

(17) that a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties;

(18) that all matters within an issue were laid before the jury and passed upon by them and, in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them;

(19) that private transactions have been fair and regular;

(20) that the ordinary course of business has been followed;

(21) that a promissory note or bill of exchange was given or endorsed for a sufficient consideration;

(22) that an endorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill;

(23) that a writing is truly dated;

(24) that a letter duly directed and mailed was received in the regular course of the mail;

(25) identity of persons from identity of name;

(26) that a person not heard from in 7 years is dead;

(27) that acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact;

(28) that things have happened according to the ordinary course of nature and the ordinary habits of life;

(29) that persons acting as partners have entered into contract of partnership;

(30) that a man and a woman deporting themselves as husband and wife have entered into a lawful contract of marriage;

(31) that a child born in lawful wedlock, there being no divorce from bed and board, is legitimate;

(32) that a thing once proved to exist continues as long as is usual with things of that nature;

(33) that the law has been obeyed;

(34) that a document or writing more than 30 years old is genuine, when the same has been since generally acted upon as genuine by persons having an interest in the question and its custody has been satisfactorily explained;

(35) that a printed and published book purporting to be printed or published by public authority was so printed or published;

(36) that a printed and published book purporting to contain reports of cases adjudged in the tribunals of the state or country where the book is published contains correct reports of such cases;

(37) that a trustee or other person whose duty it was to convey real property to a particular person has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest;

(38) the uninterrupted use by the public of land for a burial ground for 5 years, with the consent of the owner and without a reservation of his rights, is presumptive evidence of his intention to dedicate it to the public for that purpose;

(39) that there was a good and sufficient consideration for a written contract.

History: En. Sec. 3266, C. Civ. Proc. 1895; re-en. Sec. 7962, Rev. C. 1907; re-en. Sec. 10606, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1963; re-en. Sec. 10606, R.C.M. 1935; amd. Sec. 9, Ch. 20, L. 1951; R.C.M. 1947, 93-1301-7.

26-1-603. Books containing laws presumed correct. Books printed or published under the authority of a sister state or foreign country and purporting to contain the statutes, code, or other written law of such state or country or proved to be commonly admitted in the tribunals of such state or country as evidence of the written law thereof are admissible in this state as evidence of such law.

History: En. Sec. 370, p. 120, Bannack Stat.; re-en. Sec. 428, p. 221, L. 1867; re-en. Sec. 502, p. 137, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 12, p. 12, L. 1881; re-en. Sec. 646, 1st Div. Comp. Stat. 1887; en. Sec. 3188, C. Civ. Proc. 1895; re-en. Sec. 7906, Rev. C. 1907; re-en. Sec. 10550, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1900; re-en. Sec. 10550, R.C.M. 1935; R.C.M. 1947, 93-1001-12.

26-1-604. When recitals in statutes conclusive. The recitals in a public statute are conclusive evidence of the facts recited for the purpose of carrying it into effect, but no further. The recitals in a private statute are conclusive evidence between parties who claim under its provisions, but no further.

History: En. Sec. 3191, C. Civ. Proc. 1895; re-en. Sec. 7909, Rev. C. 1907; re-en. Sec. 10553, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1903; re-en. Sec. 10553, R.C.M. 1935; R.C.M. 1947, 93-1001-15.

26-1-605. Entries in official books and records prima facie evidence. Entries in public or other official books or records made in the performance of his duty by a public officer of this state or any other person in the performance of a duty specially enjoined by law are prima facie evidence of the facts stated therein.

History: En. Sec. 3208, C. Civ. Proc. 1895; re-en. Sec. 7926, Rev. C. 1907; re-en. Sec. 10570, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1920; re-en. Sec. 10570, R.C.M. 1935; R.C.M. 1947, 93-1001-32.

26-1-606. Entry made by officer or board prima facie evidence. An entry made by an officer or board of officers or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry.

History: En. Sec. 3214, C. Civ. Proc. 1895; re-en. Sec. 7932, Rev. C. 1907; re-en. Sec. 10576, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1926; re-en. Sec. 10576, R.C.M. 1935; R.C.M. 1947, 93-1001-38.

26-1-607. When writings of a decedent prima facie evidence. The entries and other writings of a decedent, made at or near the time of the transaction and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:

(1) when the entry was made against the interest of the person making it;

(2) when it was made in a professional capacity and in the ordinary course of professional conduct;

(3) when it was made in the performance of a duty specially enjoined by law.

History: En. Sec. 3237, C. Civ. Proc. 1895; re-en. Sec. 7950, Rev. C. 1907; re-en. Sec. 10594, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1946; re-en. Sec. 10594, R.C.M. 1935; R.C.M. 1947, 93-1101-17.

26-1-608 through 26-1-620 reserved.

26-1-621. Finding of presumed death under federal Missing Persons Act prima facie evidence. A written finding of presumed death made by the secretary of war, the secretary of the navy, or other officer or employee of the United States authorized to make such findings, pursuant to the federal Missing Persons Act (56 Stat. 143, 1092, and 58 Stat. 679; 50 U.S.C. App. Supp. 1001-17), as now or hereafter amended, or a duly certified copy of such finding shall be received in any court, office, or other place in this state as prima facie evidence of the death of the person therein found to be dead and the date, circumstances, and place of his disappearance.

History: En. Sec. 1, Ch. 14, L. 1947; R.C.M. 1947, 93-1001-39.

26-1-622. Official reports and records made pursuant to federal law prima facie evidence. An official written report or record, or duly certified copy thereof, that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged, or captured by an enemy or is dead or is alive, made by any officer or employee of the United States authorized by the act referred to in 26-1-621 or by any other law of the United States to make same, shall be received in any court, office, or other place in this state as prima facie evidence that such person is missing, missing in action, interned in a neutral country, or beleaguered, besieged, or captured by an enemy or is dead or is alive, as the case may be.

History: En. Sec. 2, Ch. 14, L. 1947; R.C.M. 1947, 93-1001-40.

26-1-623. Presumption of authenticity of finding, report, or record. For the purposes of 26-1-621 and 26-1-622, any finding, report, or record or duly certified copy thereof purporting to have been signed by such an officer or employee of the United States as is described in said sections shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing same shall prima facie be deemed to have acted within the scope of his authority. If a copy purports to have been certified by a person authorized by law to certify the same, such certified copy shall be prima facie evidence of his authority so to certify.

History: En. Sec. 3, Ch. 14, L. 1947; R.C.M. 1947, 93-1001-41.

Part 7

Voluntary Payment of Claims

26-1-701. Legislative policy. The legislature hereby declares that the health, welfare, and safety of the people of the state of Montana would be enhanced by the expeditious handling of liability claims. The legislature further declares that the handling of such claims would be expedited if voluntary payment by or on behalf of one person to or on behalf of a person who has sustained injury to his person or damage to his property could not be construed as an admission of fault or liability as to any claim arising out of the occurrence which gave rise to such injury or damage.

History: En. Sec. 1, Ch. 222, L. 1973; R.C.M. 1947, 93-2201-7.

26-1-702. Person defined. As used in this part, the word "person" includes any individual, partnership, joint venture, unincorporated association, private or municipal corporation, the state and its political subdivisions.

History: En. Sec. 2, Ch. 222, L. 1973; R.C.M. 1947, 93-2201-8.

26-1-703. Voluntary partial payment of claim not an admission of fault or waiver. No voluntary partial payment of a claim against any person based on alleged liability of that person for injury to person, including death, or damage to property arising out of any occurrence shall be construed as an admission of fault or liability or as a waiver or release of claim by the person to whom or in whose behalf such payment was made. No voluntary partial payment shall be construed to reduce the amount of damages which may be pleaded or proved in any action arising out of such occurrence.

History: En. Sec. 3, Ch. 222, L. 1973; R.C.M. 1947, 93-2201-9(part).

26-1-704. Fact of payment and amount inadmissible as evidence. The fact of any such voluntary payment or its amount shall not be admissible as evidence on the trial of any action arising out of such occurrence, whether on the issue of liability, the extent of the damage, or otherwise.

History: En. Sec. 3, Ch. 222, L. 1973; R.C.M. 1947, 93-2201-9(part).

26-1-705. Effect of payment upon final settlement. Upon final settlement between the parties of a claim arising out of such occurrence, the parties may make any agreement they wish with respect to all voluntary partial payments.

History: En. Sec. 3, Ch. 222, L. 1973; R.C.M. 1947, 93-2201-9(part).

26-1-706. Effect of payment on judgment. After entry of a judgment in an action for damages for personal injuries, including death, or for damage to property arising out of any occurrence, any voluntary partial payment theretofore made shall be treated as a credit against such judgment and shall be deductible from the amount of such judgment. If after partial voluntary payments are made as herein provided for, it shall be determined by a court of competent jurisdiction that the person who made such payments or on whose behalf such payments were made is liable for an amount which is less than the amount of the voluntary payments already made, such person shall have no right of action for the recovery of the amount by which the voluntary payments exceeded the amount of the judgment.

History: En. Sec. 3, Ch. 222, L. 1973; R.C.M. 1947, 93-2201-9(part).

Part 8

Privileges

26-1-801. Policy to protect confidentiality in certain relations. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the cases enumerated in this part.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 1907; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; re-en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. Sec. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(part).

26-1-802. Spousal privilege. A husband cannot be examined for or against his wife without her consent or a wife for or against her husband without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other or to a criminal action or proceeding for a crime committed by one against the other.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 1907; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; re-en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. Sec. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(1).

26-1-803. Attorney-client privilege. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon in the course of professional employment.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 1907; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; re-en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. Sec. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(2).

26-1-804. Confessions made to member of clergy. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 1907; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; re-en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. Sec. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(3).

26-1-805. Doctor-patient privilege. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 1907; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; re-en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. Sec. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(4).

26-1-806. Speech pathologist, audiologist-client privilege. A speech pathologist or audiologist cannot, without the consent of his client, be examined in a civil action as to any communication made by the client to him.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 1907; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; re-en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. Sec. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(8).

26-1-807. Psychologist-client privilege. The confidential relations and communications between a psychologist and his client shall be placed on the same basis as provided by law for those between an attorney and his client. Nothing in any act of the legislature shall be construed to require such privileged communications to be disclosed.

History: En. Sec. 12, Ch. 73, L. 1971; R.C.M. 1947, 66-3212.

26-1-808. Information gathered by psychology teachers and observers. Any person who is engaged in teaching psychology in any school or who, acting as such, is engaged in the study and observation of child mentality shall not, without the consent of the parent or guardian of such child being so taught or observed, testify in any civil action as to any information so obtained.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 1907; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; re-en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. Sec. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(6).

26-1-809. Confidential communications by student to employee of educational institution. A counselor, psychologist, nurse, or teacher employed by any educational institution cannot be examined as to communications made to him in confidence by a duly registered student of such institution. However, this provision shall not apply where consent has been given by the student, if not a minor, or, if he is a minor, by the student and his parent or legal guardian.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630,

1st Div. Rev. Stat. 1879; re-en. Secs. 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 1907; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; re-en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. Sec. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(7).

26-1-810. Confidential communications made to public officer. A public officer cannot be examined as to communications made to him in official confidence when the public interests would suffer by the disclosure.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 1907; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; re-en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. Sec. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(5).

Part 9

Reporters' Confidence Act

26-1-901. Short title. This part shall be known and may be cited as the "Reporters' Confidence Act".

History: En. Sec. 1, Ch. 195, L. 1943; R.C.M. 1947, 93-601-1.

26-1-902. Extent of reporters' privilege. (1) Without his consent no person engaged, or who was so engaged at the time the information sought was procured, in the work of or connected with or employed by any newspaper, news service, radio station, television station, or community antenna television service for the purpose of gathering, writing, editing, or disseminating news may be examined as to or may be required to disclose any information obtained or prepared or the source of that information in any legal proceeding if the information was gathered, received, or processed in the course of his employment.

(2) A person engaged as in subsection (1) may not be adjudged in contempt by a judicial, legislative, administrative, or any other body having the power to issue subpoenas for refusing to disclose the source of any information or for refusing to disclose any information obtained or prepared in gathering, receiving, or processing information in the course of his employment.

History: En. Sec. 2, Ch. 195, L. 1943; amd. Sec. 1, Ch. 56, L. 1951; amd. Sec. 1, Ch. 225, L. 1977; R.C.M. 1947, 93-601-2(1), (2).

26-1-903. Waiver of privilege. (1) Dissemination, except as provided in subsection (2), in whole or in part does not constitute a waiver of provisions of 26-1-902.

(2) If the person claiming the privilege voluntarily offers to testify, with or without having been subpoenaed, before a judicial, legislative, administrative, or other body having the power to issue subpoenas, he waives the provisions of 26-1-902.

History: En. Sec. 2, Ch. 195, L. 1943; amd. Sec. 1, Ch. 56, L. 1951; amd. Sec. 1, Ch. 225, L. 1977; R.C.M. 1947, 93-601-2(3), (4).

Part 10

Affidavits

26-1-1001. Affidavit defined. An "affidavit" is a written declaration under oath, made without notice to the adverse party.

History: En. Sec. 3321, C. Civ. Proc. 1895; re-en. Sec. 7988, Rev. C. 1907; re-en. Sec. 10632, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2003; re-en. Sec. 10632, R.C.M. 1935; R.C.M. 1947, 93-1601-2.

26-1-1002. Permissible uses for affidavits. An affidavit may be used:

(1) to verify a pleading or a paper in a special proceeding;

(2) to prove the service of a summons, notice, or other paper in an action or special proceeding;

(3) to obtain a provisional remedy, the examination of a witness, or a stay of proceedings;

(4) upon a motion; and

(5) in any other case expressly permitted by some other provision of this code.

History: En. Sec. 3330, C. Civ. Proc. 1895; re-en. Sec. 7992, Rev. C. 1907; re-en. Sec. 10636, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2009; re-en. Sec. 10636, R.C.M. 1935; R.C.M. 1947, 93-1701-1.

26-1-1003. Affidavits made in this state — before whom taken. An affidavit to be used before any court, judge, or officer of this state may be taken before any judge or clerk of any court or any justice of the peace, county clerk, or notary public in this state.

History: En. Sec. 336, p. 113, Bannack Stat.; re-en. Sec. 399, p. 215, L. 1867; re-en. Sec. 473, p. 130, Cod. Stat. 1871; re-en. Sec. 651, p. 208, L. 1877; re-en. Sec. 651, 1st Div. Rev. Stat. 1879; re-en. Sec. 672, 1st Div. Comp. Stat. 1887; re-en. Sec. 3333, C. Civ. Proc. 1895; re-en. Sec. 7995, Rev. C. 1907; re-en. Sec. 10639, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2012; re-en. Sec. 10639, R.C.M. 1935; R.C.M. 1947, 93-1701-4.

26-1-1004. Affidavits made in another state — before whom taken. An affidavit taken in another state of the United States to be used in this state may be taken before a commissioner appointed by the governor of this state to take affidavits and depositions in such other state, before any notary public in another state, or before any judge or clerk of a court of record having a seal.

History: En. Sec. 337, p. 113, Bannack Stat.; amd. Sec. 400, p. 215, L. 1867; amd. Sec. 474, p. 130, Cod. Stat. 1871; re-en. Sec. 652, p. 208, L. 1877; re-en. Sec. 652, 1st Div. Rev. Stat. 1879; re-en. Sec. 673, 1st Div. Comp. Stat. 1887; amd. Sec. 3334, C. Civ. Proc. 1895; re-en. Sec. 7996, Rev. C. 1907; re-en. Sec. 10640, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2013; re-en. Sec. 10640, R.C.M. 1935; R.C.M. 1947, 93-1701-5.

26-1-1005. Affidavits made in foreign country — before whom taken. An affidavit taken in a foreign country to be used in this state may be taken before an ambassador, minister, consul, vice consul, or consular agent of the United States or before any judge of a court of record having a seal in such foreign country.

History: En. Sec. 338, p. 113, Bannack Stat.; amd. Sec. 401, p. 215, L. 1867; amd. Sec. 475, p. 130, Cod. Stat. 1871; re-en. Sec. 653, p. 208, L. 1877; re-en. Sec. 653, 1st Div. Rev. Stat. 1879; re-en. Sec. 674, 1st Div. Comp. Stat. 1887; amd.

Sec. 3335, C. Civ. Proc. 1895; re-en. Sec. 7997, Rev. C. 1907; re-en. Sec. 10641, R.C.M. 1921, Cal. C. Civ. Proc. Sec. 2014; re-en. Sec. 10641, R.C.M. 1935; R.C.M. 1947, 93-1701-6.

26-1-1006. Verification of affidavit taken out of state. When an affidavit is taken before a judge of a court in another state or in a foreign country, the genuineness of the signature of the judge, the existence of the court, and the fact that such judge is a member thereof must be certified by the clerk of the court, under the seal thereof.

History: En. Sec. 339, p. 113, Bannack Stat.; amd. Sec. 402, p. 215, L. 1867; re-en. Sec. 476, p. 130, Cod. Stat. 1871; re-en. Sec. 654, p. 208, L. 1877; re-en. Sec. 654, 1st Div. Rev. Stat. 1879; re-en. Sec. 675, 1st Div. Comp. Stat. 1887; re-en. Sec. 3336, C. Civ. Proc. 1895; re-en. Sec. 7998, Rev. C. 1907; re-en. Sec. 10642, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2015; re-en. Sec. 10642, R.C.M. 1935; R.C.M. 1947, 93-1701-7.

26-1-1007 through 26-1-1010 reserved.

26-1-1011. Affidavit of printer or publisher as evidence of publication. Evidence of the publication of a document or notice required by law or by an order of a court or judge to be published in a newspaper may be given by the affidavit of the printer or publisher of the newspaper or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when and the paper in which the publication was made.

History: En. Sec. 13, p. 12, L. 1881; re-en. Sec. 677, 1st Div. Comp. Stat. 1887; re-en. Sec. 3331, C. Civ. Proc. 1895; re-en. Sec. 7993, Rev. C. 1907; re-en. Sec. 10637, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2010; amd. Sec. 1, Ch. 80, L. 1935; re-en. Sec. 10637, R.C.M. 1935; R.C.M. 1947, 93-1701-2.

26-1-1012. Affidavit of publication — where filed, prima facie evidence. If such affidavit be made in an action or special proceeding pending in a court, it may be filed with the court or clerk thereof. If not so made, it may be filed with the clerk of the county where the newspaper is printed. In either case the original affidavit or a copy thereof, certified by the judge of the court or clerk having it in custody, is prima facie evidence of the facts stated therein.

History: En. Sec. 655, p. 209, L. 1877; re-en. Sec. 655, 1st Div. Rev. Stat. 1879; re-en. Sec. 676, 1st Div. Comp. Stat. 1887; re-en. Sec. 3332, C. Civ. Proc. 1895; re-en. Sec. 7994, Rev. C. 1907; re-en. Sec. 10638, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2011; re-en. Sec. 10638, R.C.M. 1935; R.C.M. 1947, 93-1701-3.

CHAPTER 2

SUBPOENAS AND WITNESSES

Part 1 — Subpoenas

Section
26-2-101. Subpoena defined.
26-2-102. Issuance of subpoena.
26-2-103. Service of subpoena on concealed witness.
26-2-104. Disobedience — how punished.
26-2-105. Disobedience — civil damages.
26-2-106. Warrant to arrest and bring in disobedient witness.
26-2-107. Contents of warrant — execution.

Part 2 — Securing Testimony of Witness Who is a Prisoner

26-2-201. Court order to obtain deposition or attendance of prisoner.
26-2-202. Motion and affidavit required.
26-2-203. When production of witness may be required.

Part 3 — Duties of Witnesses

26-2-301. Witness required to attend when subpoenaed.
26-2-302. Witness required to answer questions.
26-2-303. Person present required to testify.

Part 4 — Protection of Witnesses

26-2-401. Right of witness to protection from harassment.
26-2-402. Witness protected from arrest when attending, going, and returning.
26-2-403. Arrest void — punishment and liability.
26-2-404. Affidavit of arrested witness — exoneration of arresting officer.
26-2-405. Discharge of witness from arrest by court or judge.

Part 5 — Witness Fees

26-2-501. Witnesses in courts of record and before certain court officers.
26-2-502. Witnesses in courts not of record — civil actions.
26-2-503. Witnesses in courts not of record — criminal actions and on coroner's inquests.
26-2-504. Interpreters to be paid as witnesses.
26-2-505. Expert witnesses.
26-2-506. Fees paid by party subpoenaing in civil actions.
26-2-507. Demand for advance payment of witness fees in civil action.
26-2-508. Witnesses on behalf of state or county — advance payment not required.
26-2-509. Certificate of clerk to witness to obtain payment.
26-2-510. Application of sections exempting from advance payment.

Part 1

Subpoenas

26-2-101. Subpoena defined. The process by which the attendance of a witness is required is by a subpoena. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control, which he is bound by law to produce in evidence.

History: En. Sec. 380, p. 212, L. 1867; re-en. Sec. 454, p. 127, Cod. Stat. 1871; re-en. Sec. 633, p. 204, L. 1877; re-en. Sec. 633, 1st Div. Rev. Stat. 1879; re-en. Sec. 654, 1st Div. Comp. Stat. 1887; en. Sec. 3300, C. Civ. Proc. 1895; re-en. Sec. 7974, Rev. C. 1907; re-en. Sec. 10618, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1985; re-en. Sec. 10618, R.C.M. 1935; R.C.M. 1947, 93-1501-3.

26-2-102. Issuance of subpoena. The subpoena is issued as follows:

(1) To require attendance before a court or at the trial of an issue therein, it is issued under the seal of the court before which the attendance is required or in which the issue is pending.

(2) To require attendance out of the court before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it is issued by the judge, justice, or other officer before whom the attendance is required.

(3) To require attendance before a commissioner appointed to take testimony by a court of a foreign country, of the United States, of any other state in the United States, or of any other district or county within this state or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by any judge or justice of the peace in places within his respective jurisdiction, with like power to enforce attendance and, upon certificate of contumacy to said court, to punish contempt of his process as such judge or justice could exercise if the subpoena directed the attendance of the witness before his court in a matter pending therein.

History: En. Sec. 322, p. 111, Bannack Stat.; en. Sec. 381, p. 212, L. 1867; re-en. Sec. 455, p. 127, Cod. Stat. 1871; re-en. Sec. 634, p. 204, L. 1877; re-en. Sec. 634, 1st Div. Rev. Stat. 1879; re-en. Sec. 655, 1st Div. Comp. Stat. 1887; re-en. Sec. 3301, C. Civ. Proc. 1895; re-en. Sec. 7975, Rev. C. 1907; re-en. Sec. 10619, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1986; re-en. Sec. 10619, R.C.M. 1935; R.C.M. 1947, 93-1501-4.

26-2-103. Service of subpoena on concealed witness. If a witness is concealed in a building or vessel so as to prevent the service of a subpoena upon him, any court or judge or any officer issuing a subpoena may, upon proof by affidavit of the concealment and of the materiality of the witness, make an order that the sheriff of the county serve the subpoena and the sheriff must serve it accordingly and, for that purpose, may break into the building or vessel where the witness is concealed.

History: En. Sec. 383, p. 212, L. 1867; re-en. Sec. 457, p. 127, Cod. Stat. 1871; re-en. Sec. 636, p. 205, L. 1877; re-en. Sec. 636, 1st Div. Rev. Stat. 1879; re-en. Sec. 657, 1st Div. Comp. Stat. 1887; re-en. Sec. 3303, C. Civ. Proc. 1895; re-en. Sec. 7977, Rev. C. 1907; re-en. Sec. 10621, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1988; re-en. Sec. 10621, R.C.M. 1935; R.C.M. 1947, 93-1501-6.

26-2-104. Disobedience — how punished. Disobedience to a subpoena or a refusal to be sworn or to answer as a witness or to subscribe an affidavit or deposition, when required, may be punished as a contempt by the court or officer issuing the subpoena or requiring the witness to be sworn; and if the witness be a party, his complaint or answer may be stricken out.

History: En. Sec. 329, p. 112, Bannack Stat.; amd. Sec. 387, p. 213, L. 1867; re-en. Sec. 461, p. 128, Cod. Stat. 1871; re-en. Sec. 640, p. 206, L. 1877; re-en. Sec. 640, 1st Div. Rev. Stat. 1879; re-en. Sec. 661, 1st Div. Comp. Stat. 1887; re-en. Sec. 3306, C. Civ. Proc. 1895; re-en. Sec. 7980, Rev. C. 1907; re-en. Sec. 10624, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1991; re-en. Sec. 10624, R.C.M. 1935; R.C.M. 1947, 93-1501-9.

26-2-105. Disobedience — civil damages. A witness disobeying a subpoena also forfeits to the party aggrieved the sum of $100 and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action.

History: En. Sec. 330, p. 112, Bannack Stat.; re-en. Sec. 388, p. 213, L. 1867; re-en. Sec. 462, p. 128, Cod. Stat. 1871; re-en. Sec. 641, p. 206, L. 1877; re-en. Sec. 641, 1st Div. Rev. Stat. 1879; re-en. Sec. 662, 1st Div. Comp. Stat. 1887; re-en. Sec. 3307, C. Civ. Proc. 1895; re-en. Sec. 7981, Rev. C. 1907; re-en. Sec. 10625, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1992; re-en. Sec. 10625, R.C.M. 1935; R.C.M. 1947, 93-1501-10.

26-2-106. Warrant to arrest and bring in disobedient witness. In case of a failure of a witness to attend, the court or officer issuing the subpoena, upon proof of the service thereof and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required.

History: En. Sec. 331, p. 112, Bannack Stat.; amd. Sec. 389, p. 213, L. 1867; re-en. Sec. 463, p. 128, Cod. Stat. 1871; re-en. Sec. 642, p. 207, L. 1877; re-en. Sec. 642, 1st Div. Rev. Stat. 1879; re-en. Sec. 663, 1st Div. Comp. Stat. 1887; re-en. Sec. 3308, C. Civ. Proc. 1895; re-en. Sec. 7982, Rev. C. 1907; re-en. Sec. 10626, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1993; re-en. Sec. 10626, R.C.M. 1935; R.C.M. 1947, 93-1501-11.

26-2-107. Contents of warrant — execution. Every warrant of commitment issued by a court or officer pursuant to this part must specify therein, particularly, the cause of the commitment; and if it be for refusing to answer a question, such question must be stated in the warrant. Every warrant to arrest or commit a witness pursuant to this part must be directed to the sheriff of the county where the witness may be and must be executed by him in the same manner as process by the district court.

History: En. Sec. 643, p. 207, L. 1877; re-en. Sec. 643, 1st Div. Rev. Stat. 1879; re-en. Sec. 664, 1st Div. Comp. Stat. 1887; re-en. Sec. 3309, C. Civ. Proc. 1895; re-en. Sec. 7983, Rev. C. 1907; re-en. Sec. 10627, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1994; re-en. Sec. 10627, R.C.M. 1935; R.C.M. 1947, 93-1501-12.

Part 2

Securing Testimony of Witness Who is a Prisoner

26-2-201. Court order to obtain deposition or attendance of prisoner. If the witness be a prisoner confined in a jail or prison within this state, an order for his examination in the prison upon deposition or for his temporary removal and production before a court or officer for the purpose of being orally examined may be made as follows:

(1) by the court itself in which the action or special proceeding is pending unless it be a justice's court;

(2) by a justice of the supreme court or a judge of the district court of the county where the action or proceeding is pending if pending before a justice's court or before a judge or other person out of court.

History: En. Sec. 332, p. 112, Bannack Stat.; re-en. Sec. 390, p. 213, L. 1867; re-en. Sec. 464, p. 128, Cod. Stat. 1871; re-en. Sec. 644, p. 207, L. 1877; re-en. Sec. 644, 1st Div. Rev. Stat. 1879; re-en. Sec. 665, 1st Div. Comp. Stat. 1887; amd. Sec. 3310, C. Civ. Proc. 1895; re-en. Sec. 7984, Rev. C. 1907; re-en. Sec. 10628, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1995; re-en. Sec. 10628, R.C.M. 1935; R.C.M. 1947, 93-1501-13.

26-2-202. Motion and affidavit required. Such order can only be made on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

History: En. Sec. 333, p. 113, Bannack Stat.; re-en. Sec. 391, p. 213, L. 1867; re-en. Sec. 465, p. 128, Cod. Stat. 1871; re-en. Sec. 645, p. 207, L. 1877; re-en. Sec. 645, 1st Div. Rev. Stat. 1879; re-en. Sec. 666, 1st Div. Comp. Stat. 1887; re-en. Sec. 3311, C. Civ. Proc. 1895; re-en. Sec. 7985, Rev. C. 1907; re-en. Sec. 10629, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1996; re-en. Sec. 10629, R.C.M. 1935; R.C.M. 1947, 93-1501-14.

26-2-203. When production of witness may be required. If the witness be imprisoned in the county where the action or proceeding is pending, his production may be required. In all other cases his examination, when allowed, must be taken upon deposition.

History: En. Sec. 334, p. 113, Bannack Stat.; re-en. Sec. 392, p. 213, L. 1867; re-en. Sec. 466, p. 129, Cod. Stat. 1871; re-en. Sec. 646, p. 207, L. 1877; re-en. Sec. 646, 1st Div. Rev. Stat. 1879; re-en. Sec. 667, 1st Div. Comp. Stat. 1887; re-en. Sec. 3312, C. Civ. Proc. 1895; re-en. Sec. 7986, Rev. C. 1907; re-en. Sec. 10630, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1997; re-en. Sec. 10630, R.C.M. 1935; R.C.M. 1947, 93-1501-15.

Part 3

Duties of Witnesses

26-2-301. Witness required to attend when subpoenaed. A witness served with a subpoena must attend at the time appointed, with any papers under his control required by the subpoena, and answer all pertinent and legal questions and, unless sooner discharged, must remain until the testimony is closed.

History: En. Sec. 327, p. 112, Bannack Stat.; re-en. Sec. 385, p. 213, L. 1867; re-en. Sec. 459, p. 128, Cod. Stat. 1871; re-en. Sec. 638, p. 206, L. 1877; re-en. Sec. 638, 1st Div. Rev. Stat. 1879; re-en. Sec. 659, 1st Div. Comp. Stat. 1887; amd. Sec. 3400, C. Civ. Proc. 1895; re-en. Sec. 8029, Rev. C. 1907; re-en. Sec. 10673, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2064; re-en. Sec. 10673, R.C.M. 1935; R.C.M. 1947, 93-2101-1.

26-2-302. Witness required to answer questions. A witness must answer questions legal and pertinent to the matter in issue though his answer may establish a claim against himself, but he need not give an answer which will have a tendency to subject him to punishment for a felony, nor need he give an answer which will have a direct tendency to degrade his character unless it be to the very fact in issue or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony.

History: En. Sec. 328, p. 112, Bannack Stat.; re-en. Sec. 386, p. 213, L. 1867; re-en. Sec. 460, p. 128, Cod. Stat. 1871; re-en. Sec. 639, p. 206, L. 1877; re-en. Sec. 639, 1st Div. Rev. Stat. 1879; re-en. Sec. 660, 1st Div. Comp. Stat. 1887; amd. Sec. 3401, C. Civ. Proc. 1895; re-en. Sec. 8030, Rev. C. 1907; re-en. Sec. 10674, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2065; re-en. Sec. 10674, R.C.M 1935; R.C.M. 1947, 93-2101-2.

26-2-303. Person present required to testify. A person present in court or before a judicial officer may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such court or officer.

History: En. Sec. 326, p. 112, Bannack Stat.; re-en. Sec. 384, p. 212, L. 1867; re-en. Sec. 458, p. 128, Cod. Stat. 1871; re-en. Sec. 637, p. 206, L. 1877; re-en. Sec. 637, 1st Div. Rev. Stat. 1879; re-en. Sec. 658, 1st Div. Comp. Stat. 1887; re-en. Sec. 3305, C. Civ. Proc. 1895; re-en. Sec. 7979, Rev. C. 1907; re-en. Sec. 10623, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1990; re-en. Sec. 10623, R.C.M. 1935; R.C.M. 1947, 93-1501-8.

Part 4

Protection of Witnesses

26-2-401. Right of witness to protection from harassment. It is the right of a witness to be protected from irrelevant, improper, or insulting questions and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; to be examined only as to matters legal and pertinent to the issue.

History: En. Sec. 3402, C. Civ. Proc. 1895; re-en. Sec. 8031, Rev. C. 1907; re-en. Sec. 10675, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2066; re-en. Sec. 10675, R.C.M. 1935; R.C.M. 1947, 93-2101-3.

26-2-402. Witness protected from arrest when attending, going, and returning. Every person who has been, in good faith, served with a subpoena to attend as a witness before a court, judge, commissioner, referee, or other person in a case where the disobedience of the witness may be punished as a contempt is exonerated from arrests in a civil action while going to the place of attendance, necessarily remaining there, and returning therefrom.

History: En. Sec. 335, p. 113, Bannack Stat.; amd. Sec. 393, p. 213, L. 1867; re-en. Sec. 467, p. 129, Cod. Stat. 1871; re-en. Sec. 674, p. 215, L. 1877; re-en. Sec. 3403, C. Civ. Proc. 1895; re-en. Sec. 8032, Rev. C. 1907; re-en. Sec. 10676, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2067; re-en. Sec. 10676, R.C.M. 1935; R.C.M. 1947, 93-2101-4.

26-2-403. Arrest void — punishment and liability. The arrest of a witness contrary to 26-2-402 is void and, when willfully made, is a contempt of the court; and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him and is also liable to an action at the suit of the party serving the witness with a subpoena for the damages sustained by him in consequence of the arrest.

History: En. Sec. 3404, C. Civ. Proc. 1895; re-en. Sec. 8033, Rev. C. 1907; re-en. Sec. 10677, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2068; re-en. Sec. 10677, R.C.M. 1935; R.C.M. 1947, 93-2101-5.

26-2-404. Affidavit of arrested witness — exoneration of arresting officer. (1) An officer is not liable to the party for making the arrest in ignorance of the facts creating the exoneration but is liable for any subsequent detention of the party if such party claim the exemption and make an affidavit stating that:

(a) he has been served with a subpoena to attend as a witness before a court, officer, or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpoena was issued;

(b) he has not thus been served by his own procurement with the intention of avoiding arrest; and

(c) he is at the time going to the place of attendance, returning therefrom, or remaining there in obedience to the subpoena.

(2) The affidavit may be taken by the officer and exonerates him from liability for discharging the witness when arrested.

History: En. Sec. 394, p. 214, L. 1867; re-en. Sec. 468, p. 129, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 3405, C. Civ. Proc. 1895; re-en. Sec. 8034, Rev. C. 1907; re-en. Sec. 10678, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2069; re-en. Sec. 10678, R.C.M. 1935; R.C.M. 1947, 93-2101-6.

26-2-405. Discharge of witness from arrest by court or judge. The court or officer issuing the subpoena and the court or officer before whom the attendance is required may discharge the witness from an arrest made in violation of 26-2-402. If the court has adjourned before the arrest or before application for discharge, a judge of the court may grant the discharge.

History: En. Sec. 3406, C. Civ. Proc. 1895; re-en. Sec. 8035, Rev. C. 1907; re-en. Sec. 10679, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2070; re-en. Sec. 10679, R.C.M. 1935; R.C.M. 1947, 93-2101-7.

Part 5

Witness Fees

26-2-501. Witnesses in courts of record and before certain court officers. (1) Witness fees are as follows:

(a) for attending in any civil or criminal action or proceeding before any court of record, referee, or officer authorized to take depositions or commissioners to assess damages or otherwise, for each day, $10;

(b) for mileage in traveling to the place of trial or hearing, each way, for each mile, a mileage allowance as provided in 2-18-503.

(2) However, no officer of the United States, the state of Montana, or any county, incorporated city, or town within the limits of the state of Montana shall receive any per diem when testifying in a criminal proceeding, and no witness shall receive fees in any more than one criminal case on the same day.

History: En. Sec. 4648, Pol. C. 1895; re-en. Sec. 3182, Rev. C. 1907; re-en. Sec. 4936, R.C.M. 1921; amd. Sec. 2, Ch. 18, L. 1935; re-en. Sec. 4936, R.C.M. 1935; amd. Sec. 2, Ch. 117, L. 1963; amd. Sec. 3, Ch. 332, L. 1971; amd. Sec. 11, Ch. 439, L. 1975; R.C.M. 1947, 25-404.

26-2-502. Witnesses in courts not of record — civil actions. Witnesses in courts not of record in civil actions and proceedings shall receive $3 for each day's actual attendance and mileage as provided in 2-18-503 for each mile actually traveled in going from their residences by the usual traveled route to the court and return.

History: En. Sec. 3, Ch. 48, L. 1903; re-en. Sec. 3186, Rev. C. 1907; re-en. Sec. 4941, R.C.M. 1921; amd. Sec. 3, Ch. 18, L. 1935; re-en. Sec. 4941, R.C.M. 1935; amd. Sec. 4, Ch. 332, L. 1971; amd. Sec. 7, Ch. 420, L. 1975; R.C.M. 1947, 25-409.

26-2-503. Witnesses in courts not of record — criminal actions and on coroner's inquests. Witnesses in courts not of record in criminal actions and on coroner's inquests shall receive $3 per day for actual attendance and mileage as provided in 2-18-503 for each mile actually and necessarily traveled from their places of residence to the court and return.

History: En. Sec. 4, Ch. 48, L. 1903; re-en. Sec. 3187, Rev. C. 1907; re-en. Sec. 4942, R.C.M. 1921; amd. Sec. 4, Ch. 18, L. 1935; re-en. Sec. 4942, R.C.M. 1935; amd. Sec. 5, Ch. 332, L. 1971; amd. Sec. 8, Ch. 420, L. 1975; R.C.M. 1947, 25-410.

26-2-504. Interpreters to be paid as witnesses. Interpreters and translators must receive the same fees as witnesses.

History: En. Sec. 4657, Pol. C. 1895; re-en. Sec. 3191, Rev. C. 1907; re-en. Sec. 4946, R.C.M. 1921; re-en. Sec. 4946, R.C.M. 1935; R.C.M. 1947, 25-413.

26-2-505. Expert witnesses. An expert is a witness and receives the same compensation as a witness.

History: En. Sec. 4658, Pol. C. 1895; re-en. Sec. 3192, Rev. C. 1907; re-en. Sec. 4947, R.C.M. 1921; re-en. Sec. 4947, R.C.M. 1935; R.C.M. 1947, 25-414.

26-2-506. Fees paid by party subpoenaing in civil actions. The fees and compensation of a witness in all civil actions must be paid by the party who caused him to be subpoenaed.

History: En. Sec. 4654, Pol. C. 1895; re-en. Sec. 3188, Rev. C. 1907; re-en. Sec. 4943, R.C.M. 1921; re-en. Sec. 4943, R.C.M. 1935; R.C.M. 1947, 25-411.

26-2-507. Demand for advance payment of witness fees in civil action. No witness shall be obliged to attend court or before a referee, officer authorized to take depositions, or commissioner, when subpoenaed, unless his mileage and fees for 1 day's attendance are tendered or paid to him on his demanding the same or unless his fees for attendance thereafter for each day are tendered or paid to him on demand. The fees of witnesses paid may be taxed as costs against the losing party.

History: En. Sec. 4655, Pol. C. 1895; re-en. Sec. 3189, Rev. C. 1907; re-en. Sec. 4944, R.C.M. 1921; amd. Sec. 1, Ch. 71, L. 1927; re-en. Sec. 4944, R.C.M. 1935; R.C.M. 1947, 25-412.

26-2-508. Witnesses on behalf of state or county — advance payment not required. The attorney general or any county attorney is authorized to cause subpoenas to be issued and compel the attendance of witnesses on behalf of the state or county without paying or tendering fees in advance to either officers or witnesses; and any witness refusing to or failing to attend, after being served with a subpoena, may be proceeded against and is liable in the same manner as is provided by law in other cases where fees have been tendered or paid.

History: En. Sec. 4620, Pol. C. 1895; re-en. Sec. 3153, Rev. C. 1907; re-en. Sec. 4902, R.C.M. 1921; re-en. Sec. 4902, R.C.M. 1935; R.C.M. 1947, 25-218.

26-2-509. Certificate of clerk to witness to obtain payment. The clerk of any court before which any witness shall have attended on behalf of the state or county in any civil action must give to such witness a certificate under seal of travel and attendance, which shall entitle him to receive the amount therein stated from the state or county treasurer.

History: En. Sec. 4621, Pol. C. 1895; re-en. Sec. 3154, Rev. C. 1907; re-en. Sec. 4903, R.C.M. 1921; re-en. Sec. 4903, R.C.M. 1935; R.C.M. 1947, 25-219.

26-2-510. Application of sections exempting from advance payment. The provisions of 26-2-508 and 26-2-509 shall extend to all actions and proceedings brought in the name of the attorney general or any other person or persons for the benefit of the state or county.

History: En. Sec. 4622, Pol. C. 1895; re-en. Sec. 3155, Rev. C. 1907; re-en. Sec. 4904, R.C.M. 1921; re-en. Sec. 4904, R.C.M. 1935; R.C.M. 1947, 25-220.

CHAPTER 3

EFFECT OF FORMER JUDGMENTS AND ORDERS

Part 1 — General Provisions

Section
26-3-101. Kinds of jurisdiction necessary to sustain a record.
26-3-102. What considered adjudged in a judgment.
26-3-103. When parties are considered to be the same.
26-3-104. Principal bound when surety bound.
26-3-105. Impeachment of a judicial record.

Part 2 — Effect of Specific Kinds of Judicial Records

26-3-201. Effect of judgment or final order — when conclusive.

26-3-202. Effect of other judicial orders — when disputable presumption created.
26-3-203. Effect of judicial record of another state.
26-3-204. Effect of judicial record of foreign court of admiralty.
26-3-205. Effect of judgments of other foreign tribunals.

Part 1

General Provisions

26-3-101. Kinds of jurisdiction necessary to sustain a record. The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment.

History: En. Sec. 3205, C. Civ. Proc. 1895; re-en. Sec. 7923, Rev. C. 1907; re-en. Sec. 10567, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1917; re-en. Sec. 10567, R.C.M. 1935; R.C.M. 1947, 93-1001-29.

26-3-102. What considered adjudged in a judgment. That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged or which was actually and necessarily included therein or necessary thereto.

History: En. Sec. 3199, C. Civ. Proc. 1895; re-en. Sec. 7917, Rev. C. 1907; re-en. Sec. 10561, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1911; re-en. Sec. 10561, R.C.M. 1935; R.C.M. 1947, 93-1001-23.

26-3-103. When parties are considered to be the same. The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either.

History: En. Sec. 3198, C. Civ. Proc. 1895; re-en. Sec. 7916, Rev. C. 1907; re-en. Sec. 10560, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1910; re-en. Sec. 10560, R.C.M. 1935; R.C.M. 1947, 93-1001-22.

26-3-104. Principal bound when surety bound. Whenever, pursuant to 26-3-102, 26-3-103, 26-3-201, and 26-3-202, a party is bound by a record and such party stands in the relation of a surety for another, the latter is also bound from the time that he has notice of the action or proceeding and an opportunity at the surety's request to join in the defense.

History: En. Sec. 3200, C. Civ. Proc. 1895; re-en. Sec. 7918, Rev. C. 1907; re-en. Sec. 10562, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1912; re-en. Sec. 10562, R.C.M. 1935; R.C.M. 1947, 93-1001-24.

26-3-105. Impeachment of a judicial record. Any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record in respect to the proceedings.

History: En. Sec. 3204, C. Civ. Proc. 1895; re-en. Sec. 7922, Rev. C. 1907; re-en. Sec. 10566, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1916; re-en. Sec. 10566, R.C.M. 1935; R.C.M. 1947, 93-1001-28.

Part 2

Effect of Specific Kinds of Judicial Records

26-3-201. Effect of judgment or final order — when conclusive. The effect of a judgment or final order in an action or special proceeding before a court or judge of this state or of the United States having jurisdiction to pronounce the judgment or order is as follows:

(1) In case of a judgment or order against a specific thing, or in respect to the probate of a will or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will or administration, or the condition or relation of the person.

(2) In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.

History: En. Sec. 3196, C. Civ. Proc. 1895; re-en. Sec. 7914, Rev. C. 1907; re-en. Sec. 10558, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1908; re-en. Sec. 10558, R.C.M. 1935; R.C.M. 1947, 93-1001-20.

26-3-202. Effect of other judicial orders — when disputable presumption created. Other judicial orders of a court or judge of this state or of the United States create a disputable presumption, according to the matter directly determined, between the same parties and their representatives and successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity.

History: En. Sec. 3197, C. Civ. Proc. 1895; re-en. Sec. 7915, Rev. C. 1907; re-en. Sec. 10559, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1909; re-en. Sec. 10559, R.C.M. 1935; R.C.M. 1947, 93-1001-21.

26-3-203. Effect of judicial record of another state. The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced here by an action or special proceeding and except that the authority of a guardian or committee or of an executor or administrator does not extend beyond the jurisdiction of the government under which he was invested with his authority.

History: En. Sec. 3201, C. Civ. Proc. 1895; re-en. Sec. 7919, Rev. C. 1907; re-en. Sec. 10563, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1913; re-en. Sec. 10563, R.C.M. 1935; R.C.M. 1947, 93-1001-25.

26-3-204. Effect of judicial record of foreign court of admiralty. The effect of the judicial record of a court of admiralty of a foreign country is the same as if it were the record of a court of admiralty of the United States.

History: En. Sec. 3202, C. Civ. Proc. 1895; re-en. Sec. 7920, Rev. C. 1907; re-en. Sec. 10564, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1914; re-en. Sec. 10564, R.C.M. 1935; R.C.M. 1947, 93-1001-26.

26-3-205. Effect of judgments of other foreign tribunals. The effect of the judgment of any other tribunal of a foreign country having jurisdiction to pronounce the judgment is as follows:

(1) In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing.

(2) In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title and can only be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.

History: **En. Sec. 3203, C. Civ. Proc. 1895; re-en. Sec. 7921, Rev. C. 1907; re-en. Sec. 10565, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1915; re-en. Sec. 10565, R.C.M. 1935; R.C.M. 1947, 93-1001-27.**

CHAPTERS 4 THROUGH 9

RESERVED

CHAPTER 10

MONTANA RULES OF EVIDENCE

Article I. — General Provisions

Rule

100. Short title.
101. Scope.
102. Purpose and construction.
103. Rulings on evidence.
104. Preliminary questions of admissibility.
105. Limited admissibility.
106. Remainder of or related acts, writings, or statements.

Article II. — Judicial Notice

201. Judicial notice of facts.
202. Judicial notice of law.

Article III. — Presumptions

301. Presumptions in general.
302. Applicability of federal law in civil cases.

Article IV. — Relevancy and Its Limits

401. Definition of relevant evidence.
402. Relevant evidence generally admissible; irrelevant evidence inadmissible.
403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.
404. Character evidence not admissible to prove conduct, exceptions; other crimes; character in issue.
405. Methods of proving character.
406. Habit; routine practice.
407. Subsequent remedial measures.
408. Compromise and offers to compromise.
409. Payment of expenses.
410. Offer to plead guilty; nolo contendere; withdrawn plea of guilty.
411. Liability insurance.

Article V. — Privileges

501. Privileges recognized only as provided.
502. Identity of informer.

503. Waiver of privilege by voluntary disclosure.
504. Privileged matter disclosed under compulsion or without opportunity to claim the privilege.
505. Comment upon or inference from claim of privilege.

Article VI. — Witnesses

601. Competency in general; disqualification.
602. Lack of personal knowledge.
603. Oath or affirmation.
604. Interpreters.
605. Competency of judge as witness.
606. Competency of juror as witness.
607. Who may impeach; party not bound by testimony.
608. Evidence of character and conduct of witness.
609. Impeachment by evidence of conviction of crime.
610. Religious beliefs or opinions.
611. Mode and order of interrogation and presentation; re-examination and recall; confrontation.
612. Writings used to refresh memory.
613. Prior statements of witnesses.
614. Calling and interrogation of witnesses by court.
615. Exclusion of witnesses.

Article VII. — Opinions and Expert Testimony

701. Opinion testimony by lay witnesses.
702. Testimony by experts.
703. Basis of opinion testimony by experts.
704. Opinions on ultimate issue.
705. Disclosure of facts or data underlying expert opinion.

Article VIII. — Hearsay

801. Definitions.
802. Hearsay rule.
803. Hearsay exceptions: availability of declarant immaterial.
804. Hearsay exceptions: declarant unavailable.
805. Hearsay within hearsay.
806. Attacking and supporting the credibility of declarant.

Article IX. — Authentication and Identification

901. Requirement of authentication or identification.
902. Self-authentication.
903. Subscribing witness' testimony unnecessary.

Article X. — Contents of Writings, Recordings, and Photographs

1001. Definitions.
1002. Requirement of original.
1003. Admissibility of duplicates, copies of certain entries.
1004. Admissiblity of other evidence of contents.
1005. Public records.
1006. Summaries.
1007. Testimony or written admission of party.
1008. Functions of court and jury.

Article I

General Provisions

Rule 100. Short title.

These rules may be known and cited as the Montana Rules of Evidence.

Rule 101. Scope.

(a) Proceedings generally. These rules govern all proceedings in all courts in the state of Montana with the exceptions stated in this rule.

(b) Rules of privilege. The rules with respect to privileges found in Article V apply at all stages of all actions, cases and proceedings.

(c) Rules inapplicable. The rules (other than those with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

(2) Grand jury. Proceedings before grand juries.

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations and proceedings on applications for leave to file informations in criminal cases; sentencing; dispositional hearings in youth court proceedings; granting or revoking probation or parole; issuance of warrants for arrest, criminal summonses and notices to appear, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) Summary proceedings. Proceedings, other than motions for summary judgment, where the court is authorized by law to act summarily.

(5) Other miscellaneous proceedings. Ex parte matters; and proceedings, when authorized by law, which are uncontested or nonadversary.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 102. Purpose and construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 103. Rulings on evidence.

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of the jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 104. Preliminary questions of admissibility.

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court. In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Admissibility subject to a condition. Except as otherwise provided by law, when the admissibility of evidence depends upon proof of other connecting facts, the court may admit such evidence subject to the condition that further evidence be introduced sufficient to support a finding of those connecting facts. The order of proof may be regulated by the sound discretion of the court.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 105. Limited admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 106. Remainder of or related acts, writings, or statements.

(a) When part of an act, declaration, conversation, writing or recorded statement or series thereof is introduced by a party:

(1) an adverse party may require him at that time to introduce any other part of such item or series thereof which ought in fairness to be considered at that time; or

(2) an adverse party may inquire into or introduce any other part of such item of evidence or series thereof.

(b) This rule does not limit the right of any party to cross-examine or further develop as part of his case matters covered by this rule.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Article II

Judicial Notice

Rule 201. Judicial notice of facts.

(a) Scope of rule. This rule governs judicial notice of all facts.

(b) Kinds of facts. A fact to be judicially noticed must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing the jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 202. Judicial notice of law.

(a) Scope of rule. This rule governs judicial notice of law.

(b) Kinds of law. Law includes but is not limited to the following:

(1) The common law, constitutions and statutes of the United States and of this and every other state, territory and jurisdiction of the United States;

(2) Duly enacted ordinances and regulations of governmental divisions of this state, including their charters;

(3) Regulations and legislative enactments issued by or under authority of the United States and of this and any state of the United States by or for their agencies or administrations;

(4) Official acts of the legislative, executive, and judicial departments of the United States and of this and any state of the United States;

(5) Private acts and resolutions of the Congress of the United States and of the legislature of this state;

(6) Records of any court of this state or of any court of record of the United States or any court of record of any state of the United States;

(7) Rules of practice and procedure of any court of this state or of any court of record of the United States or any court of record of any state of the United States;

(8) The law of foreign nations;

(9) International law;

(10) Maritime law;

(11) The seals of office of the officers of government in the legislative, executive, and judicial departments of government of the United States and of this and every other state, territory and jurisdiction of the United States, of any foreign jurisdiction recognized by the executive power of the United States, and of notaries public.

(c) When discretionary. A court may take judicial notice of the law listed in parts 2-10 of Rule 202(b) or other law, whether requested or not. The court may inform itself of any law in such manner as it may deem proper and the court may call upon counsel to aid it in obtaining such information.

(d) When mandatory. A court shall take judicial notice:

(1) of the common law, constitutions and statutes of the United States and of this and every other state, territory and jurisdiction of the United States; and

(2) of any other law when requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the law noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice.

(1) Judicial notice of the laws of this state and of the United States may be taken at any stage of the proceedings.

(2) Any party may present to the judge or court any admissible evidence of law. To enable a party to offer evidence of the law other than of this state and of the United States or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse party either in the pleadings or otherwise.

(g) Question for the court. Except as otherwise provided by law, the determination of law shall be made by the court.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Article III

Presumptions

Rule 301. Presumptions in general.

(a) Presumption defined. A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action or proceeding.

(b) Classification and effect of presumptions.

(1) Conslusive presumptions are presumptions that are specifically declared conclusive by statute. Conclusive presumptions may not be controverted.

(2) All presumptions, other than conclusive presumptions, are disputable presumptions and may be controverted. A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.

(c) Inconsistent presumptions. If presumptions are inconsistent the court shall apply the presumption that is founded upon weightier considerations of public policy. If considerations of public policy are of equal weight the court shall disregard both presumptions.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 302. Applicability of federal law in civil cases.

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Article IV

Relevancy and Its Limits

Rule 401. Definition of relevant evidence.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 404. Character evidence not admissible to prove conduct, exceptions; other crimes; character in issue.

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same.

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case or in an assault case where the victim is incapable of testifying to rebut evidence that the victim was the first aggressor.

(3) Character of witness. Evidence of the character of a witness, as provided in Article VI.

(b) Other crimes, wrongs, acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(c) Character in issue. Evidence of a person's character or a trait of his character is admissible in cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 405. Methods of proving character.

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, or where the character of the victim relates to the reasonableness of force used by the accused in self defense, proof may also be made of specific instances of his conduct.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 406. Habit; routine practice.

(a) Habit and routine practice defined. A habit is a person's regular response to a repeated specific situation. A routine practice is a regular course of conduct of a group of persons or an organization.

(b) Admissibility. Evidence of habit or of routine practice, whether corroborated or not, and regardless of the presence of eyewitnesses, is relevant to prove that conduct on a particular occasion was in conformity with the habit or routine practice.

(c) Method of proof. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 407. Subsequent remedial measures.

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 408. Compromise and offers to compromise.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 409. Payment of expenses.

Evidence of payment of expenses occasioned by an injury or occurrence is not admissible to prove liability.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 410. Offer to plead guilty; nolo contendere; withdrawn plea of guilty.

Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer. This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 411. Liability insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Article V

Privileges

Rule 501. Privileges recognized only as provided.

Except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state, no person has a privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 502. Identity of informer.

(a) Rule of privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law.

(b) Who may claim the privilege. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

(c) Exceptions and limitations.

(1) Voluntary disclosure; informer a witness. No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informer's own action, or if the informer appears as a witness for the public entity.

(2) Testimony on relevant issue. If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case or to a fair determination of a material issue on the merits in a civil case to which a public entity is a party, and the public entity invokes the privilege, the court shall give the public entity an opportunity to show facts relevant to determining whether the informer can, in fact, supply that testimony.

If the Court finds that the informer should be required to give the testimony, and the public entity elects not to disclose his identity, the court on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the court may do so on its own motion. In civil cases, the court may make any order that justice requires.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 503. Waiver of privilege by voluntary disclosure.

(a) General rule. A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

(b) Joint holders. Where two or more persons are joint holders of a privilege, a waiver of the right of a particular joint holder to claim the privilege does not affect the right of another joint holder to claim the privilege.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 504. Privileged matter disclosed under compulsion or without opportunity to claim the privilege.
A claim of privilege is not defeated by a disclosure which was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 505. Comment upon or inference from claim of privilege.
The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by the court or counsel. No inference may be drawn therefrom.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Article VI

Witnesses

Rule 601. Competency in general; disqualification.
(a) General rule competency. Every person is competent to be a witness except as otherwise provided in these rules.

(b) Disqualification of witnesses. A person is disqualified to be a witness if the court finds that (1) the witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him or (2) the witness is incapable of understanding the duty of a witness to tell the truth.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 602. Lack of personal knowledge.
A witness may not testify as to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 603. Oath or affirmation.
Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 604. Interpreters.
An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 605. Competency of judge as witness.
The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 606. Competency of juror as witness.

(a) At the trial. A member of the jury may not be called or testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or dissent from the verdict or indictment or concerning his mental processes in connection therewith. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

However, as an exception to this subdivision, a juror may testify and an affidavit or evidence of any kind be received as to any matter or statement concerning only the following questions, whether occurring during the course of the jury's deliberations or not: (1) whether extraneous prejudicial information was improperly brought to the jury's attention; or (2) whether any outside influence was brought to bear upon any juror; or (3) whether any juror has been induced to assent to any general or special verdict, or finding on any question submitted to them by the court, by a resort to the determination of chance.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 607. Who may impeach; party not bound by testimony.

(a) The credibility of a witness may be attacked by any party, including the party calling him.

(b) No party is bound by the testimony of any witness.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 608. Evidence of character and conduct of witness.

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 609. Impeachment by evidence of conviction of crime.

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is not admissible.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 610. Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by their nature his credibility is impaired or enhanced.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 611. Mode and order of interrogation and presentation; re-examination and recall; confrontation.

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination.

(1) Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(2) Evidence developed on cross-examination may be considered by the trier of fact as proof of any fact in issue in the case.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

(d) Re-examination and recall. A witness may be re-examined as to the same matters to which he testified only in the discretion of the court, but without exception he may be re-examined as to any new matter brought out during cross-examination. After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court. This rule shall not limit the right of any party to recall a witness in rebuttal.

(e) Confrontation. Except as otherwise provided by constitution, statute, these rules, or other rules applicable to the courts of this state, at the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 612. Writings used to refresh memory.

If a witness uses a writing to refresh his memory for the purpose of testifying, either

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce into evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 613. Prior statements of witnesses.

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 614. Calling and interrogation of witnesses by court.

(a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or a party; provided, however, that in trials before a jury, the court's questioning must be cautiously guarded so as not to constitute express or implied comment.

(c) Objections. Objections to the calling of a witness by the court or to the interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 615. Exclusion of witnesses.

At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Article VII

Opinions and Expert Testimony

Rule 701. Opinion testimony by lay witnesses.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 702. Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 703. Basis of opinion testimony by experts.

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 704. Opinions on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Article VIII

Hearsay

Rule 801. Definitions.

The following definitions apply under this article:

(a) Statement. A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A declarant is a person who makes a statement.

(c) Hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of subsequent fabrication, improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of that relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 802. Hearsay rule.

Hearsay is not admissible except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 803. Hearsay exceptions: availability of declarant immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then-existing mental, emotional, or physical condition. A statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time of the acts, events, conditions, opinions, or diagnosis, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. To the extent not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the government in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; and (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more, the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce or dissolution of marriage, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the commmunity, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among his associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal prosecution, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 804. Hearsay exceptions: declarant unavailable.

(a) Definition of unavailability. Unavailability as a witness includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, (A) in civil actions and proceedings, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered; and (B) in criminal actions and proceedings, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, and redirect examination.

(2) Statement under belief of impending death. A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstance of what he believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce or dissolution of marriage, legitimacy, relationship by blood, or family history, even though the declarant had no means of acquiring the personal knowledge of the matter stated; or

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 805. Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of a combined statement conforms with an exception to the hearsay rule provided in these rules.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 806. Attacking and supporting the credibility of declarant.

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Article IX

Authentication and Identification

Rule 901. Requirement of authentication or identification.

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including

self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Method provided by statute or rule. Any method of authentication or identification provided by statute, these rules, or other rules applicable in the courts of this state.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. Except as otherwise provided by statute, a document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution of attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If a reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this state.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged docuents. Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgements.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions created by law. Any signature, document, or other matter declared by any law of the United States or of this state to be presumptively or prima facie genuine or authentic.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 903. Subscribing witness' testimony unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Article X

Contents of Writings, Recordings, and Photographs

Rule 1001. Definitions.

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. Writings and recordings consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. Photographs include still photographs, x-ray films, video tapes, and motion pictures.

(3) Original. An original of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.

(4) Duplicate. A duplicate is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

(5) Copies of entries in the regular course of business. A copy of an entry in the regular course of business consists of an entry in a writing kept in the regular course of business copied from another such writing by manual or mechanical means at or near the time of the transaction.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 1002. Requirement of original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 1003. Admissibility of duplicates, copies of certain entries.

A duplicate, or copy of an entry in the regular course of business as defined in Rule 1001(5), is admissible to the same extent as an original unless:

(1) a genuine question is raised as to the authenticity of the original; or

(2) in the circumstances it would be unfair to admit the duplicate or copy of an entry in the regular course of business in lieu of the original; or

(3) otherwise provided by statute.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 1004. Admissibility of other evidence of contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 1005. Public records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be otained by the exercise of reasonable diligence, then other evidence of the contents may be given.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 1006. Summaries.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 1007. Testimony or written admission of party.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 1008. Functions of court and jury.

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is for the court to determine in accordance with the provisions of Rule 104.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

TITLE 27

REMEDIES

Ch.
1. Availability of Remedies — Liability.
2. Statutes of Limitations.
Chapters 3 and 4 reserved.
5. Arbitration.
6. Montana Medical Malpractice Panel Act.
7. Submission of Controversy Without Action.
8. Uniform Declaratory Judgments Act.
9. Confession of Judgment.
Chapters 10 through 14 reserved.
15. Provisional Remedies.
16. Arrest and Bail in Civil Actions.
17. Claim and Delivery of Personal Property.
18. Prejudgment Attachment.
19. Injunctions.
20. Receivers.
Chapters 21 through 24 reserved.
25. Certiorari — Writ of Review.
26. Mandamus — Writ of Mandate.
27. Writ of Prohibition.
28. Quo Warranto.
Chapter 29 reserved.
30. Nuisances.
31. Change of Name.
32. Judicial Determination of Birth Date.

CHAPTER 1

AVAILABILITY OF REMEDIES — LIABILITY

Part 1 — General Provisions

Section
27-1-101. Judicial remedies defined.
27-1-102. Actions and special proceedings defined.
27-1-103. Civil and criminal actions.
27-1-104. Bases for civil actions.
27-1-105. Obligation defined.
27-1-106. Injury defined.
27-1-107. Kinds of relief — when given.

Part 2 — Damages

27-1-201. Detriment defined.
27-1-202. Right to compensatory damages.
27-1-203. Right to damages for detriment resulting after suit brought and for future detriment.
27-1-204. Nominal damages when no appreciable detriment.
Sections 27-1-205 through 27-1-210 reserved.
27-1-211. Right to interest.

27-1-212. When award of interest discretionary.
27-1-213. Validity of interest rate set by contract.
27-1-214. Waiver of interest by accepting principal.
Sections 27-1-215 through 27-1-220 reserved.
27-1-221. When exemplary damages allowed.
27-1-222. Exemplary damages for inhumane injuries to animals.
27-1-223. Damages for injuries or death inflicted in a duel.

Part 3 — Measure of Damages

27-1-301. Prescribed damages exclusive of exemplary damages and interest.
27-1-302. Damages to be reasonable.
27-1-303. Limitation of damages for breach of obligation.
27-1-304. Value of written instrument.
27-1-305. Property of peculiar value.
Sections 27-1-306 through 27-1-310 reserved.
27-1-311. Breach of contract.
27-1-312. Breach of obligation to pay money.
27-1-313. Breach of warranty of agent's authority.
27-1-314. Breach of agreement to convey real property.
27-1-315. Breach of agreement to buy real property.
27-1-316. Breach of convenants in grants of estates in real property.
27-1-317. Breach of obligation other than contract.
27-1-318. Wrongful occupation of real property.
27-1-319. Willful holding over of real property.
27-1-320. Conversion of personal property.
27-1-321. Conversion of personal property — damages of lienholder.
27-1-322. Seduction.
27-1-323. Wrongful death.

Part 4 — Specific and Preventive Relief

27-1-401. When specific or preventive relief permitted.
27-1-402. How specific relief given.
27-1-403. How preventive relief given.
Sections 27-1-404 through 27-1-410 reserved.
27-1-411. When specific performance of an obligation may be compelled.
27-1-412. Obligations which cannot be specifically enforced.
27-1-413. Specific performance not to be oppressive.
27-1-414. Right to specific performance to be mutual.
27-1-415. Parties who cannot be compelled to perform.
27-1-416. Parties who cannot obtain specific performance.
27-1-417. Specific performance by party who signed when other party did not sign contract.
27-1-418. Liquidation of damages not a bar to specific performance.
27-1-419. Specific performance of agreement to transfer property — distinction between real and personal property.
27-1-420. No specific performance of agreement to buy property when title not clear.
27-1-421. Compelling performance of successor in interest in title — obligations respecting real property.
Sections 27-1-422 through 27-1-430 reserved.
27-1-431. Judgment for possession of or title to real property.
27-1-432. Judgment for delivery of personal property.
27-1-433. Cancellation of written instrument.

Part 5 — Right to Bring Action or Assert Defense

27-1-501. Survival of cause of action or defense — death or other disability or transfer of interest.
27-1-502. Survival of counterclaim — death or assignment.
27-1-503. What defenses to action survive assignment of right to action.
Sections 27-1-504 through 27-1-510 reserved.
27-1-511. Right of minor to bring civil action or other proceeding.

27-1-512. Action by parent or guardian for injury to or death of child or ward.
27-1-513. Action for wrongful death of adult.
27-1-514. Who may sue for whose seduction.
27-1-515. Protection of personal relations — abduction.
27-1-516. Injury to servant.

Part 6 — Abolition of Certain Causes of Action

27-1-601. Cause of action for alienation of affections abolished.
27-1-602. Cause of action for breach of promise abolished — right to damages for fraud and unjust enrichment preserved.
27-1-603. Acts within Montana not to give rise to abolished cause of action.
27-1-604. Litigation and threat of litigation prohibited.
27-1-605. Agreements settling or compromising abolished causes of action.
27-1-606. Criminal penalty.

Part 7 — Liability

27-1-701. Liability for negligence as well as willful acts.
27-1-702. Comparative negligence — extent to which contributory negligence bars recovery in action for damages.
27-1-703. Multiple defendants jointly and severally liable — right of contribution.
Sections 27-1-704 through 27-1-710 reserved.
27-1-711. Liability of minor or person of unsound mind for own torts — exemplary damages.
27-1-712. Liability for damages for deceit.
27-1-713. Duty to restore thing wrongfully acquired or retained.
27-1-714. Limits on liability for emergency care rendered at scene of accident or emergency.
27-1-715. Liability of owner of vicious dog.

Part 8 — Libel and Slander

27-1-801. Defamation — how effected.
27-1-802. Libel defined.
27-1-803. Slander defined.
27-1-804. What communications are privileged.
Sections 27-1-805 through 27-1-810 reserved.
27-1-811. When owner of radio station not liable for material broadcast.
27-1-812. Right of owner to require prior submission of text to be broadcast.
27-1-813. Liability of person broadcasting — liability of owner for broadcast prepared by station.
27-1-814. Media management to be given opportunity to publish correction prior to action for libel or slander.
27-1-815. What constitutes a reasonable time for correction.
27-1-816. Content of correction.
27-1-817. Extent to which a correction is a defense upon trial.

Part 1

General Provisions

27-1-101. Judicial remedies defined. Judicial remedies are such as are administered by the courts of justice or by judicial officers empowered for the purpose by the constitution and statutes of this state.

History: En. Sec. 3469, C. Civ. Proc. 1895; re-en. Sec. 8077, Rev. C. 1907; re-en. Sec. 8995, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 20; re-en. Sec. 8995, R.C.M. 1935; R.C.M. 1947, 93-2201.

27-1-102. Actions and special proceedings defined. (1) These remedies are divided into two classes:

(a) actions; and

(b) special proceedings.

(2) An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Every other remedy is a special proceeding.

History: (1)En. Sec. 3470, C. Civ. Proc. 1895; re-en. Sec. 8078, Rev. C. 1907; re-en. Sec. 8996, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 21; re-en. Sec. 8996, R.C.M. 1935; Sec. 93-2202, R.C.M. 1947; (2)Ap. p. Sec. 3471, C. Civ. Proc. 1895; re-en. Sec. 8079, Rev. C. 1907; re-en. Sec. 8997, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 22; re-en. Sec. 8997, R.C.M. 1935; Sec. 93-2203, R.C.M. 1947; Ap. p. Sec. 3472, C. Civ. Proc. 1895; re-en. Sec. 8080, Rev. C. 1907; re-en. Sec. 8998, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 23; re-en. Sec. 8998, R.C.M. 1935; Sec. 92-2204, R.C.M. 1947; R.C.M. 1947, 92-2202, 93-2203, 93-2204.

27-1-103. Civil and criminal actions. (1) Actions are of two kinds:

(a) civil; and

(b) criminal.

(2) A civil action is prosecuted by one party against another for the enforcement or protection of a right or the redress or prevention of a wrong. Titles 45 and 46 define and provide for the prosecution of a criminal action. When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

History: (1)En. Sec. 3473, C. Civ. Proc. 1895; re-en. Sec. 8081, Rev. C. 1907; re-en. Sec. 8999, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 24; re-en. Sec. 8999, R.C.M. 1935; Sec. 92-2205, R.C.M. 1947; (2)Ap. p. Sec. 3479, C. Civ. Proc. 1895; re-en. Sec. 8087, Rev. C. 1907; re-en. Sec. 9005, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 30; re-en. Sec. 9005, R.C.M. 1935; Sec. 93-2211, R.C.M. 1947; Ap. p. Sec. 3480, C. Civ. Proc. 1895; re-en. Sec. 8088, Rev. C. 1907; re-en. Sec. 9006, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 31; re-en. Sec. 9006, R.C.M. 1935; Sec. 93-2212, R.C.M. 1947, 93-2212; Ap. p. Sec. 3481, C. Civ. Proc. 1895; re-en. Sec. 8089, Rev. C. 1907; re-en. Sec. 9007, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 32; re-en. Sec. 9007, R.C.M. 1935; Sec. 93-2213, R.C.M. 1947; R.C.M. 1947, 93-2205, 93-2211, 93-2212, 93-2213.

27-1-104. Bases for civil actions. A civil action arises out of:

(1) an obligation;

(2) an injury.

History: En. Sec. 3474, C. Civ. Proc. 1895; re-en. Sec. 8082, Rev. C. 1907; re-en. Sec. 9000, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 25; re-en. Sec. 9000, R.C.M. 1935; R.C.M. 1947, 93-2206.

27-1-105. Obligation defined. An obligation is a legal duty by which one person is bound to do or not to do a certain thing and arises from:

(1) contract; or

(2) operation of law.

History: En. Sec. 3475, C. Civ. Proc. 1895; re-en. Sec. 8083, Rev. C. 1907; re-en. Sec. 9001, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 26; re-en. Sec. 9001, R.C.M. 1935; R.C.M. 1947, 93-2207.

27-1-106. Injury defined. (1) An injury is of two kinds:

(a) to the person; and

(b) to property.

(2) An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating, or destroying it. Every other injury is an injury to the person.

History: (1)En. Sec. 3476, C. Civ. Proc. 1895; re-en. Sec. 8084, Rev. C. 1907; re-en. Sec. 9002, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 27; re-en. Sec. 9002, R.C.M. 1935; Sec. 93-2208, R.C.M. 1947; (2)Ap. p. Sec. 3477, C. Civ. Proc. 1895; re-en. Sec. 8085, Rev. C. 1907; re-en. Sec. 9003, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 28; re-en. Sec. 9003, R.C.M. 1935; Sec. 93-2209, R.C.M. 1947; Ap. p. Sec. 3478, C. Civ. Proc. 1895; re-en. Sec. 8086, Rev. C. 1907; re-en. Sec. 9004, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 29; re-en. SEc. 9004, R.C.M. 1935; Sec. 93-2210, R.C.M. 1947; R.C.M. 1947, 93-2208, 93-2209, 93-2210.

27-1-107. Kinds of relief — when given. As a general rule, compensation is the relief or remedy provided by the law of this state for the violation of private rights and the means of securing their observance, and specific and preventive relief may be given in no other cases than those specified in parts 2, 3, and 4 of this chapter, 27-19-102, 27-19-103, 28-1-104, and parts 16 and 17 of chapter 2 of Title 28.

History: En. Sec. 4260, Civ. C. 1895; re-en. Sec. 6038, Rev. C. 1907; re-en. Sec. 8657, R.C.M. 1921; Cal. Civ. C. Sec. 3274; re-en. Sec. 8657, R.C.M. 1935; R.C.M. 1947, 17-101.

Part 2

Damages

27-1-201. Detriment defined. Detriment is a loss or harm suffered in person or property.

History: En. Sec. 4271, Civ. C. 1895; re-en. Sec. 6041, Rev. C. 1907; re-en. Sec. 8660, R.C.M. 1921; Cal. Civ. C. Sec. 3282; Field Civ. C. Sec. 1833; re-en. Sec. 8660, R.C.M. 1935; R.C.M. 1947, 17-202.

27-1-202. Right to compensatory damages. Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages.

History: En. Sec. 4270, Civ. C. 1895; re-en. Sec. 6040, Rev. C. 1907; re-en. Sec. 8659, R.C.M. 1921; Cal. Civ. C. Sec. 3281; Field Civ. C. Sec. 1832; re-en. Sec. 8659, R.C.M. 1935; R.C.M. 1947, 17-201.

27-1-203. Right to damages for detriment resulting after suit brought and for future detriment. Damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof or certain to result in the future.

History: En. Sec. 4272, Civ. C. 1895; re-en. Sec. 6042, Rev. C. 1907; re-en. Sec. 8661, R.C.M. 1921; Cal. Civ. C. Sec. 3283; Field Civ. C. Sec. 1834; re-en. Sec. 8661, R.C.M. 1935; R.C.M. 1947, 17-203.

27-1-204. Nominal damages when no appreciable detriment. When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages.

History: En. Sec. 4367, Civ. C. 1895; re-en. Sec. 6088, Rev. C. 1907; re-en. Sec. 8706, R.C.M. 1921; Cal. Civ. C. Sec. 3360; Field Civ. C. Sec. 1879; re-en. Sec. 8706, R.C.M. 1935; R.C.M. 1947, 17-608.

27-1-205 through 27-1-210 reserved.

27-1-211. Right to interest. Every person who is entitled to recover damages certain or capable of being made certain by calculation and the right to recover which is vested in him upon a particular day is entitled also to recover interest thereon from that day except during such time as the debtor is prevented by law or by the act of the creditor from paying the debt.

History: En. Sec. 4280, Civ. C. 1895; re-en. Sec. 6043, Rev. C. 1907; re-en. Sec. 8662, R.C.M. 1921; Cal. Civ. C. Sec. 3287; Field Civ. C. Sec. 1835; re-en. Sec. 8662, R.C.M. 1935; R.C.M. 1947, 17-204.

27-1-212. When award of interest discretionary. In an action for the breach of an obligation not arising from contract and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury. This section does not apply in actions for recovery of damages arising from injury to a person or property brought against a governmental entity under Title 2, chapter 9, parts 1 through 3, as amended.

History: En. Sec. 4281, Civ. C. 1895; re-en. Sec. 6044, Rev. C. 1907; re-en. Sec. 8663, R.C.M. 1921; Cal. Civ. C. Sec. 3288; Field Civ. C. Sec. 1836; re-en. Sec. 8663, R.C.M. 1935; amd. Sec. 3, Ch. 234, L. 1977; R.C.M. 1947, 17-205.

27-1-213. Validity of interest rate set by contract. Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation.

History: En. Sec. 4282, Civ. C. 1895; re-en. Sec. 6045, Rev. C. 1907; re-en. Sec. 8664, R.C.M. 1921; Cal. Civ. C. Sec. 3289; Field Civ. C. Sec. 1837; re-en. Sec. 8664, R.C.M. 1935; R.C.M. 1947, 17-206.

27-1-214. Waiver of interest by accepting principal. Accepting payment of the whole principal, as such, waives all claim to interest.

History: En. Sec. 4283, Civ. C. 1895; re-en. Sec. 6046, Rev. C. 1907; re-en. Sec. 8665, R.C.M. 1921; Cal. Civ. C. Sec. 3290; Field Civ. C. Sec. 1838; re-en. Sec. 8665, R.C.M. 1935; R.C.M. 1947, 17-207.

27-1-215 through 27-1-220 reserved.

27-1-221. When exemplary damages allowed. In any action for a breach of an obligation not arising from contract where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant.

History: En. Sec. 4290, Civ. C. 1895; re-en. Sec. 6047, Rev. C. 1907; re-en. Sec. 8666, R.C.M. 1921; Cal. Civ. C. Sec. 3294; Field. Civ. C. Sec. 1839; re-en. Sec. 8666, R.C.M. 1935; R.C.M. 1947, 17-208.

27-1-222. Exemplary damages for inhumane injuries to animals. For wrongful injuries to animals, being subjects of property, committed willfully or by gross negligence in disregard of humanity, exemplary damages may be given.

History: En. Sec. 4337, Civ. C. 1895; re-en. Sec. 6075, Rev. C. 1907; re-en. Sec. 8693, R.C.M. 1921; Cal. Civ. C. Sec. 3340; Field Civ. C. Sec. 1867; re-en. Sec. 8693, R.C.M. 1935; R.C.M. 1947; 17-408.

27-1-223. Damages for injuries or death inflicted in a duel. If any person slays or permanently disables another person in a duel in this state, the slayer must provide for the maintenance of the spouse of the person slain or permanently disabled and for the minor children in such manner and at such cost, either by aggregate compensation in damages to each or by a monthly, quarterly, or annual allowance, to be determined by the court. If any person slays or disables another person in a duel in this state, the slayer is liable for and must pay all debts of the person slain or permanently disabled.

History: Ap. p. Sec. 4353, Civ. C. 1895; re-en. Sec. 6079, Rev. C. 1907; re-en. Sec. 8697, R.C.M. 1921; Cal. Civ. C. Sec. 3347; re-en. Sec. 8697, R.C.M. 1935; amd. Sec. 11, Ch. 535, L. 1975; Sec. 17-504, R.C.M. 1947; Ap. p. Sec. 4354, Civ. C. 1895; re-en. Sec. 6080, Rev. C. 1907; re-en. Sec. 8698, R.C.M. 1921; Cal. Civ. C. Sec. 3348; re-en. Sec. 8698, R.C.M. 1935; Sec. 17-505, R.C.M. 1947; R.C.M. 1947, 17-504, 17-505.

Part 3

Measure of Damages

27-1-301. Prescribed damages exclusive of exemplary damages and interest. The damages prescribed by 27-1-204, 27-1-222, 27-1-223, and this part are exclusive of exemplary damages and interest except where those are expressly mentioned.

History: En. Sec. 4364, Civ. C. 1895; re-en. Sec. 6085, Rev. C. 1907; re-en. Sec. 8703, R.C.M. 1921; Cal. Civ. C. Sec. 3357; Field Civ. C. Sec. 1876; re-en. Sec. 8703, R.C.M. 1935; R.C.M. 1947, 17-605.

27-1-302. Damages to be reasonable. Damages must in all cases be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages contrary to substantial justice, no more than reasonable damages can be recovered.

History: En. Sec. 4366, Civ. C. 1895; re-en. Sec. 6087, Rev. C. 1907; re-en. Sec. 8705, R.C.M. 1921; Cal. Civ. C. Sec. 3359; Field. Civ. C. Sec. 1878; re-en. Sec. 8705, R.C.M. 1935; R.C.M. 1947, 17-607.

27-1-303. Limitation of damages for breach of obligation. Notwithstanding the provisions of 27-1-204, 27-1-222, 27-1-223, and this part, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides except in the cases specified in 27-1-221 through 27-1-223, 27-1-322, 70-16-108, 70-27-207, and 70-27-208.

History: En. Sec. 4365, Civ. C. 1895; re-en. Sec. 6086, Rev. C. 1907; re-en. Sec. 8704, R.C.M. 1921; Cal. Civ. C. Sec. 3358; Field. Civ. C. Sec. 1877; re-en. Sec. 8704, R.C.M. 1935; R.C.M. 1947, 17-606.

27-1-304. Value of written instrument. For the purpose of estimating damages, the value of an instrument in writing is presumed to be equal to that of the property to which it entitles the owner.

History: En. Sec. 4363, Civ. C. 1895; re-en. Sec. 6084, Rev. C. 1907; re-en. Sec. 8702, R.C.M. 1921; Cal. Civ. C. Sec. 3356; Based on Field. Civ. C. Sec. 1875; re-en. Sec. 8702, R.C.M. 1935; R.C.M. 1947, 17-604.

27-1-305. Property of peculiar value. Where a certain property has a peculiar value to a person recovering damages for deprivation thereof or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof or against a willful wrongdoer.

History: En. Sec. 4362, Civ. C. 1895; re-en. Sec. 6083, Rev. C. 1907; re-en. Sec. 8701, R.C.M. 1921; Cal. Civ. C. Sec. 3355; Field Civ. C. Sec. 1874; re-en. Sec. 8701, R.C.M. 1935; R.C.M. 1947, 17-603.

27-1-306 through 27-1-310 reserved.

27-1-311. Breach of contract. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby or which in the ordinary course of things would be likely to result therefrom. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.

History: Ap. p. Sec. 4300, Civ. C. 1895; re-en. Sec. 6048, Rev. C. 1907; re-en. Sec. 8667, R.C.M. 1921; Cal. Civ. C. Sec. 3300; Based on Field Civ. C. Sec. 1840; re-en. Sec. 8667, R.C.M. 1935; Sec. 17-301, R.C.M. 1947; Ap. p. Sec. 4301, Civ. C. 1895; re-en. Sec. 6049, Rev. C. 1907; re-en. Sec. 8668, R.C.M. 1921; Cal. Civ. C. Sec. 3301; Field Civ. C. Sec. 1841; re-en. Sec. 8668, R.C.M. 1935; Sec. 17-302, R.C.M. 1947; R.C.M. 1947, 17-301, 17-302.

27-1-312. Breach of obligation to pay money. The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation with interest thereon.

History: En. Sec. 4302, Civ. C. 1895; re-en. Sec. 6050, Rev. C. 1907; re-en. Sec. 8669, R.C.M. 1921; Cal. Civ. C. Sec. 3302; Field Civ. C. Sec. 1842; re-en. Sec. 8669, R.C.M. 1935; R.C.M. 1947, 17-303.

27-1-313. Breach of warranty of agent's authority. The detriment caused by the breach of a warranty of an agent's authority is deemed to be the amount which could have been recovered and collected from his principal if the warranty had been complied with and the reasonable expenses of legal proceedings taken in good faith to enforce the act of the agent against his principal.

History: En. Sec. 4318, Civ. C. 1895; re-en. Sec. 6066, Rev. C. 1907; re-en. Sec. 8684, R.C.M. 1921; Cal. Civ. C. Sec. 3318; Field Civ. C. Sec. 1858; re-en. Sec. 8684, R.C.M. 1935; R.C.M. 1947, 17-318.

27-1-314. Breach of agreement to convey real property. The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon, but adding thereto in case of bad faith the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach and the expenses properly incurred in preparing to enter upon the land.

History: En. Sec. 4306, Civ. C. 1895; re-en. Sec. 6054, Rev. C. 1907; re-en. Sec. 8672, R.C.M. 1921; Cal. Civ. C. Sec. 3306; Field Civ. C. Sec. 1846; re-en. Sec. 8672, R.C.M. 1935; R.C.M. 1947, 17-306.

27-1-315. Breach of agreement to buy real property. The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller under the contract over the value of the property to him.

History: En. Sec. 4307, Civ. C. 1895; re-en. Sec. 6055, Rev. C. 1907; re-en. Sec. 8673, R.C.M. 1921; Cal. Civ. C. Sec. 3307; Field Civ. C. Sec. 1847; re-en. Sec. 8673, R.C.M. 1935; R.C.M. 1947, 17-307.

27-1-316. Breach of convenants in grants of estates in real property. (1) The detriment caused by the breach of a covenant of seizin, of right to convey, of warranty, or of quiet enjoyment in a grant of an estate in real property is deemed to be:

(a) the price paid to the grantor or, if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore at the time of the grant to the value of the whole property;

(b) interest thereon for the time during which the grantee derived no benefit from the property, not exceeding 5 years;

(c) any expenses properly incurred by the covenantee in defending his possession.

(2) The detriment caused by the breach of a covenant against encumbrances in a grant of an estate in real property is deemed to be the amount which has been actually expended by the covenantee in extinguishing either the principal or interest thereof, not exceeding in the former case a proportion of the price paid to the grantor equivalent to the relative value at the time of the grant of the property affected by the breach as compared with the whole or, in the latter case, interest on a like amount.

History: (1)En. Sec. 4304, Civ. C. 1895; re-en. Sec. 6052, Rev. C. 1907; re-en. Sec. 8670, R.C.M. 1921; Cal. Civ. C. Sec. 3304; Based on Field Civ. C. Sec. 1844; re-en. Sec. 8670, R.C.M. 1935; Sec. 17-304, R.C.M. 1947; (2)En. Sec. 4305, Civ. C. 1895; re-en. Sec. 6053, Rev. C. 1907; re-en. Sec. 8671, R.C.M. 1921; Cal. Civ. C. Sec. 3305; Field Civ. C. Sec. 1845; re-en. Sec. 8671, R.C.M. 1935; Sec. 17-305, R.C.M. 1947; R.C.M. 1947, 17-304, 17-305.

27-1-317. Breach of obligation other than contract. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

History: En. Sec. 4330, Civ. C. 1895; re-en. Sec. 6068, Rev. C. 1907; re-en. Sec. 8686, R.C.M. 1921; Cal. Civ. C. Sec. 3333; Field. Civ. C. Sec. 1860; re-en. Sec. 8686, R.C.M. 1935; R.C.M. 1947, 17-401.

27-1-318. Wrongful occupation of real property. The detriment caused by the wrongful occupation of real property in cases not otherwise provided for in this code is deemed to be the value of the use of the property for the time of such occupation, not exceeding 5 years next preceding the commencement of the action or proceeding to enforce the right to damages, and the costs, if any, of recovering the possession.

History: En. Sec. 4331, Civ. C. 1895; re-en. Sec. 6069, Rev. C. 1907; re-en. Sec. 8687, R.C.M. 1921; Cal. Civ. C. Sec. 3334; Based on Field Civ. C. Sec. 1861; re-en. Sec. 8687, R.C.M. 1935; R.C.M. 1947, 17-402.

27-1-319. Willful holding over of real property. For willfully holding over real property by a person who entered upon the same as guardian or trustee for an infant or by right of an estate terminable with any life or lives, after the termination of the trust or particular estate, without the consent of the party immediately entitled after such termination, the measure of damages is the value of the profits received during such holding over.

History: En. Sec. 4332, Civ. C. 1895; re-en. Sec. 6070, Rev. C. 1907; re-en. Sec. 8688, R.C.M. 1921; Cal. Civ. C. Sec. 3335; Field. Civ. C. Sec. 1862; re-en. Sec. 8688, R.C.M. 1935; R.C.M. 1947, 17-403.

27-1-320. Conversion of personal property. (1) The detriment caused by the wrongful conversion of personal property is presumed to be:

(a) the value of the property at the time of its conversion with the interest from that time or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict without interest, at the option of the injured party; and

(b) a fair compensation for the time and money properly expended in pursuit of the property.

(2) The presumption declared by subsection (1) cannot be repelled in favor of one whose possession was wrongful from the beginning by his subsequent application of the property to the benefit of the owner without his consent.

History: (1)En. Sec. 4333, Civ. C. 1895; re-en. Sec. 6071, Rev. C. 1907; re-en. Sec. 8689, R.C.M. 1921; Cal. Civ. C. Sec. 3336; Field Civ. C. Sec. 1863; re-en. Sec. 8689, R.C.M. 1935; Sec. 17-404, R.C.M. 1947; (2)En. Sec. 4334, Civ. C. 1895; re-en. Sec. 6072, Rev. C. 1907; re-en. Sec. 8690, R.C.M. 1921; Cal. Civ. C. Sec. 3337; Field. Civ. C. Sec. 1864; re-en. Sec. 8690, R.C.M. 1935; Sec. 17-405, R.C.M. 1947; R.C.M. 1947, 17-404, 17-405.

27-1-321. Conversion of personal property — damages of lienholder. One having a mere lien on personal property cannot recover greater damages for its conversion, from one having a right thereto superior to his after his lien is discharged, than the amount secured by the lien and the compensation allowed by 27-1-320(1) for the loss of time and expenses.

History: En. Sec. 4335, Civ. C. 1895; re-en. Sec. 6073, Rev. C. 1907; re-en. Sec. 8691, R.C.M. 1921; Cal. Civ. C. Sec. 3338; Field Civ. C. Sec. 1865; re-en. Sec. 8691, R.C.M. 1935; R.C.M. 1947, 17-406.

27-1-322. Seduction. The damages for seduction rest in the sound discretion of the jury.

History: En. Sec. 4336, Civ. C. 1895; re-en. Sec. 6074, Rev. C. 1907; re-en. Sec. 8692, R.C.M. 1921; Cal. Civ. C. Sec. 3339; Field Civ. C. Sec. 1866; re-en. Sec. 8692, R.C.M. 1935; R.C.M. 1947, 17-407.

27-1-323. Wrongful death. In every action under 27-1-512 and 27-1-513, such damages may be given as under all the circumstances of the case may be just.

History: En. Sec. 1, p. 561, Cod. Stat. 1871; en. Sec. 14, p. 42, L. 1877; re-en. Sec. 14, 1st Div. Rev. Stat. 1879; re-en. Sec. 14, 1st Div. Comp. Stat. 1887; re-en. Sec. 579, C. Civ. Proc. 1895; re-en. Sec. 6486, Rev. C. 1907; re-en. Sec. 9076, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 377; re-en. Sec. 9076, R.C.M. 1935; R.C.M. 1947, 93-2810(part).

Part 4

Specific and Preventive Relief

27-1-401. When specific or preventive relief permitted. Specific or preventive relief may be given in the cases specified in this part and Title 28, chapter 2, parts 16 and 17, and in no others. Neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, or to enforce the penalty or forfeiture in any case.

History: Ap. p. Sec. 4380, Civ. C. 1895; re-en. Sec. 6089, Rev. C. 1907; re-en. Sec. 8707, R.C.M. 1921; Cal. Civ. C. Sec. 3366; Field Civ. C. Sec. 1880; re-en. Sec. 8707, R.C.M. 1935; Sec. 17-701, R.C.M. 1947; Ap. p. Sec. 4383, Civ. C. 1895; re-en. Sec. 6092, Rev. C. 1907; re-en. Sec. 8710, R.C.M. 1921; Cal. Civ. C. Sec. 3369; Field Civ. C. Sec. 1883; re-en. Sec. 8710, R.C.M. 1935; Sec. 17-704, R.C.M. 1947; R.C.M. 1947, 17-701, 17-704.

27-1-402. How specific relief given. Specific relief is given by:

(1) taking possession of a thing and delivering it to a claimant;

(2) compelling the party himself to do that which ought to be done; or

(3) declaring and determining the rights of parties otherwise than by an award of damages.

History: En. Sec. 4381, Civ. C. 1895; re-en. Sec. 6090, Rev. C. 1907; re-en. Sec. 8708, R.C.M. 1921; Cal. Civ. C. Sec. 3367; Field Civ. C. Sec. 1881; re-en. Sec. 8708, R.C.M. 1935; R.C.M. 1947, 17-702.

27-1-403. How preventive relief given. Preventive relief is given by prohibiting a party from doing that which ought not to be done. Preventive relief is granted by injunction, provisional or final.

History: Ap. p. Sec. 4382, Civ. C. 1895; re-en. Sec. 6091, Rev. C. 1907; re-en. Sec. 8709, R.C.M. 1921; Cal. Civ. C. Sec. 3368; Field. Civ. C. Sec. 1882; re-en. Sec. 8709, R.C.M. 1935; Sec. 17-703, R.C.M. 1947; Ap. p. Sec. 4460, Civ. C. 1895; re-en. Sec. 6118, Rev. C. 1907; re-en. Sec. 8736, R.C.M. 1921; Cal. Civ. C. Sec. 3420; Field Civ. C. Sec. 1909; re-en. Sec. 8736, R.C.M. 1935; Sec. 17-1101, R.C.M. 1947; R.C.M. 1947, 17-703, 17-1101.

27-1-404 through 27-1-410 reserved.

27-1-411. When specific performance of an obligation may be compelled. Except as otherwise provided in this part and Title 28, chapter 2, parts 16 and 17, the specific performance of an obligation may be compelled when:

(1) the act to be done is in the performance, wholly or partly, of an express trust;

(2) the act to be done is such that pecuniary compensation for its nonperformance would not afford adequate relief;

(3) it would be extremely difficult to ascertain the actual damage caused by the nonperformance of the act to be done; or

(4) it has been expressly agreed in writing, between the parties to the contract, that specific performance thereof may be required by either party or that damages shall not be considered adequate relief.

History: En. Sec. 4410, Civ. C. 1895; re-en. Sec. 6096, Rev. C. 1907; re-en. Sec. 8714, R.C.M. 1921; Cal. Civ. C. Sec. 3384; Field Civ. C. Sec. 1887; re-en. Sec. 8714, R.C.M. 1935; R.C.M. 1947, 17-801.

27-1-412. Obligations which cannot be specifically enforced. The following obligations cannot be specifically enforced:

(1) an obligation to render personal service or to employ another therein;

(2) an agreement to marry or live with another;

(3) an agreement to submit a controversy to arbitration;

(4) an agreement to perform an act which the party has not power to perform lawfully when required to do so;

(5) an agreement to procure the act or consent of the spouse of the contracting party or of any other third person; or

(6) an agreement the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.

History: En. Sec. 4416, Civ. C. 1895; re-en. Sec. 6102, Rev. C. 1907; re-en. Sec. 8720, R.C.M. 1921; Cal. Civ. C. Sec. 3390; Field Civ. C. Sec. 1893; re-en. Sec. 8720, R.C.M. 1935; amd. Sec. 12, Ch. 535, L. 1975; R.C.M. 1947, 17-807.

27-1-413. Specific performance not to be oppressive. Specific performance cannot be compelled when it would operate more harshly upon the party required to perform than its refusal would operate upon the party seeking it.

History: En. Sec. 4419, Civ. C. 1895; re-en. Sec. 6105, Rev. C. 1907; re-en. Sec. 8723, R.C.M. 1921; Field Civ. C. Sec. 1896; re-en. Sec. 8723, R.C.M. 1935; R.C.M. 1947, 17-810.

27-1-414. Right to specific performance to be mutual. (1) When either of the parties to an obligation is entitled to a specific performance thereof according to the provisions of 27-1-411, the other party is also entitled to it, though not within those provisions.

(2) Neither party to any obligation can be compelled specifically to perform it unless the other party thereto has performed or is compellable specifically to perform everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance.

History: (1)En. Sec. 4411, Civ. C. 1895; re-en. Sec. 6097, Rev. C. 1907; re-en. Sec. 8715, R.C.M. 1921; Cal. Civ. C. Sec. 3385; Field Civ. C. Sec. 1888; re-en. Sec. 8715, R.C.M. 1935; Sec. 17-802, R.C.M. 1947; (2)En. Sec. 4412, Civ. C. 1895; re-en. Sec. 6098, Rev. C. 1907; re-en. Sec. 8716, R.C.M. 1921; Cal. Civ. C. Sec. 3386; Field Civ. C. Sec. 1889; re-en. Sec. 8716, R.C.M. 1935; Sec. 17-803, R.C.M. 1947; R.C.M. 1947, 17-802, 17-803.

27-1-415. Parties who cannot be compelled to perform. Specific performance cannot be enforced against a party to a contract in any of the following cases:

(1) if he has not received an adequate consideration for the contract;

(2) if it is not, as to him, just and reasonable;

(3) if his assent was obtained by the misrepresentations, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract or by any promise of such party which has not been substantially fulfilled; or

(4) if his assent was given under the influence of mistake, misapprehension, or surprise, except that where the contract provides for compensation in case of mistake, a mistake within the scope of such provision may be compensated for and the contract specifically enforced in other respects if proper to be so enforced.

History: En. Sec. 4417, Civ. C. 1895; re-en. Sec. 6103, Rev. C. 1907; re-en. Sec. 8721, R.C.M. 1921; Cal. Civ. C. Sec. 3391; Field Civ. C. Sec. 1894; re-en. Sec. 8721, R.C.M. 1935; R.C.M. 1947, 17-808.

27-1-416. Parties who cannot obtain specific performance. Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party except where his failure to perform is only partial and either entirely immaterial or capable of being fully compensated, in which case specific performance may be compelled upon full compensation being made for the default.

History: En. Sec. 4418, Civ. C. 1895; re-en. Sec. 6104, Rev. C. 1907; re-en. Sec. 8722, R.C.M. 1921; Cal. Civ. C. Sec. 3392; Field Civ. C. Sec. 1895; re-en. Sec. 8722, R.C.M. 1935; R.C.M. 1947, 17-809.

27-1-417. Specific performance by party who signed when other party did not sign contract. A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed or offers to perform it on his part and the case is otherwise proper for enforcing specific performance.

History: En. Sec. 4414, Civ. C. 1895; re-en. Sec. 6100, Rev. C. 1907; re-en. Sec. 8718, R.C.M. 1921; Cal. Civ. C. Sec. 3388; Field. Civ. C. Sec. 1891; re-en. Sec. 8718, R.C.M. 1935; R.C.M. 1947, 17-805.

27-1-418. Liquidation of damages not a bar to specific performance. A contract otherwise proper to be specifically enforced may be thus enforced though a penalty is imposed or the damages are liquidated for its breach and the party in default is willing to pay the same.

History: En. Sec. 4415, Civ. C. 1895; re-en. Sec. 6101, Rev. C. 1907; re-en. Sec. 8719, R.C.M. 1921; Cal. Civ. C. Sec. 3389; Field Civ. C. Sec. 1892; re-en. Sec. 8719, R.C.M. 1935; R.C.M. 1947, 17-806.

27-1-419. Specific performance of agreement to transfer property — distinction between real and personal property. It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation and that the breach of an agreement to transfer personal property can be thus relieved.

History: En. Sec. 4413, Civ. C. 1895; re-en. Sec. 6099, Rev. C. 1907; re-en. Sec. 8717, R.C.M. 1921; Cal. Civ. C. Sec. 3387; Field Civ. C. Sec. 1890; re-en. Sec. 8717, R.C.M. 1935; R.C.M. 1947, 17-804.

27-1-420. No specific performance of agreement to buy property when title not clear. An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give to the buyer a title free from reasonable doubt.

History: En. Sec. 4420, Civ. C. 1895; re-en. Sec. 6106, Rev. C. 1907; re-en. Sec. 8724, R.C.M. 1921; Cal. Civ. C. Sec. 3394; Field Civ. C. Sec. 1897; re-en. Sec. 8724, R.C.M. 1935; R.C.M. 1947, 17-811.

27-1-421. Compelling performance of successor in interest in title — obligations respecting real property. Whenever an obligation in respect to real property would be specifically enforced against a particular person, it may be in like manner enforced against any other person claiming under him by a title created subsequently to the obligation except a purchaser or encumbrancer in good faith and for value, and except that any such person may exonerate himself by conveying all his estate to the person entitled to enforce the obligation.

History: En. Sec. 4421, Civ. C. 1895; re-en. Sec. 6107, Rev. C. 1907; re-en. Sec. 8725, R.C.M. 1921; Cal. Civ. C. Sec. 3395; Field Civ. C. Sec. 1898; re-en. Sec. 8725, R.C.M. 1935; R.C.M. 1947, 17-812.

27-1-422 through 27-1-430 reserved.

27-1-431. Judgment for possession of or title to real property. A person entitled to specific real property, by reason either of a perfected title or of a claim to title which ought to be perfected, may recover the same in the manner prescribed by this code, either by a judgment for its possession to be executed by the sheriff or by a judgment requiring the other party to perfect the title and to deliver possession of the property.

History: En. Sec. 4390, Civ. C. 1895; re-en. Sec. 6093, Rev. C. 1907; re-en. Sec. 8711, R.C.M. 1921; Cal. Civ. C. Sec. 3375; Field. Civ. C. Sec. 1884; re-en. Sec. 8711, R.C.M. 1935; R.C.M. 1947, 17-705.

27-1-432. Judgment for delivery of personal property. A person entitled to the immediate possession of specific personal property may recover the same in the manner provided by this code. Any person having the possession or control of a particular article of personal property of which he is not the owner may be compelled specifically to deliver it to the person entitled to its immediate possession.

History: Ap. p. Sec. 4400, Civ. C. 1895; re-en. Sec. 6094, Rev. C. 1907; re-en. Sec. 8712, R.C.M. 1921; Cal. Civ. C. Sec. 3379; Field Civ. C. Sec. 1885; re-en. Sec. 8712, R.C.M, 1935; Sec. 17-706, R.C.M. 1947; Ap. p. Sec. 4401, Civ. C. 1895; re-en. Sec. 6095, Rev. C. 1907; re-en. Sec. 8713, R.C.M. 1921; Cal. Civ. C. Sec. 3380; Based on Field Civ. C. Sec. 1886; re-en. Sec. 8713, R.C.M. 1935; Sec. 17-707, R.C.M. 1947; R.C.M. 1947, 17-706, 17-707.

27-1-433. Cancellation of written instrument. (1) A written instrument in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable may, upon his application, be so adjudged and ordered to be delivered up or canceled.

(2) An instrument the invalidity of which is apparent upon its face or upon the face of another instrument which is necessary to the use of the former in evidence is not to be deemed capable of causing injury within the provisions of subsection (1).

(3) Where an instrument is evidence of different rights or obligations, it may be cancelled in part and allowed to stand for the residue.

History: (1)En. Sec. 4450, Civ. C. 1895; re-en. Sec. 6115, Rev. C. 1907; re-en. Sec. 8733, R.C.M. 1921; Cal. Civ. C. Sec. 3412; Field Civ. C. Sec. 1906; re-en. Sec. 8733, R.C.M. 1935; Sec. 17-1001, R.C.M. 1947; (2)En. Sec. 4451, Civ. C. 1895; re-en. Sec. 6116, Rev. C. 1907; re-en. Sec. 8734, R.C.M. 1921; Cal. Civ. C. Sec. 3413; Field Civ. C. Sec. 1907; re-en. Sec. 8734, R.C.M. 1935; Sec. 17-1002, R.C.M. 1947; (3)En. Sec. 4452, Civ. C. 1895; re-en. Sec. 6117, Rev. C. 1907; re-en. Sec. 8735, R.C.M. 1921; Cal. Civ. C. Sec. 3414; Field Civ. C. Sec. 1908; re-en. Sec. 8735, R.C.M. 1935; Sec. 17-1003, R.C.M. 1947; R.C.M. 1947, 17-1001, 17-1002, 17-1003.

Part 5

Right to Bring Action or Assert Defense

27-1-501. Survival of cause of action or defense — death or other disability or transfer of interest. An action, cause of action, or defense shall not abate by death or other disability of a party or by the transfer of any interest therein but shall, in all cases where a cause of action or defense arose in favor of such party prior to his death or other disability or transfer of interest therein, survive and be maintained by his representatives or successors in interest; and in case such action has not been begun or defense interposed, the action may be begun or defense set up in the name of his representatives or successors in interest; and in case the action has been begun or defense set up, the court shall, on motion, allow the action or proceeding to be continued by or against his representatives or successors in interest. In case of any transfer of interest, the action or proceeding may be continued in the name of the original party or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.

History: En. Sec. 16, p. 45, Bannack Stat.; re-en. Sec. 16, p. 137, L. 1867; re-en. Sec. 16, p. 29, Cod. Stat. 1871; amd. Sec. 22, p. 43, L. 1877; re-en. Sec. 22, 1st Div. Rev. Stat. 1879; en. Sec. 1, p. 98, L. 1883; re-en. Sec. 22, 1st Div. Comp. Stat. 1887; amd. Sec. 587, C. Civ. Proc. 1895; re-en. Sec. 6494, Rev. C. 1907; re-en. Sec. 9086, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 385; re-en. Sec. 9086, R.C.M. 1935;

repealed Sec. 84, Ch. 13, L. 1961; reinstated Sec. 2, Ch. 14, L. 1963; R.C.M. 1947, 93-2824.

27-1-502. Survival of counterclaim — death or assignment. When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other and neither can be deprived of the benefit thereof by the assignment or death of the other.

History: En. Sec. 48, p. 52, Bannack Stat.; re-en. Sec. 48, p. 143, L. 1867; re-en. Sec. 58, p. 39, Cod. Stat. 1871; re-en. Sec. 89, p. 61, L. 1877; re-en. Sec. 89, 1st Div. Rev. Stat. 1879; re-en. Sec. 91, 1st Div. Comp. Stat. 1887; amd. Sec. 698, C. Civ. Proc. 1895; re-en. Sec. 6548, Rev. C. 1907; re-en. Sec. 9145, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 440; re-en. Sec. 9145, R.C.M. 1935; R.C.M. 1947, 93-3409.

27-1-503. What defenses to action survive assignment of right to action. In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any setoff or other defense existing at the time of or before notice of the assignment, but this section shall apply only to the extent not otherwise provided for in the Uniform Commercial Code.

History: En. Sec. 5, p. 44, Bannack Stat.; re-en. Sec. 5, p. 136, L. 1867; re-en. Sec. 5, p. 28, Cod. Stat. 1871; re-en. Sec. 5, p. 40, L. 1877; re-en. Sec. 5, 1st Div. Rev. Stat. 1879; re-en. Sec. 5, 1st Div. Comp. Stat. 1887; re-en. Sec. 571, C. Civ. Proc. 1895; re-en. Sec. 6478, Rev. C. 1907; re-en. Sec. 9068, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 368; re-en. Sec. 9068, R.C.M. 1935; amd. Sec. 11-157, Ch. 264, L. 1963; R.C.M. 1947, 93-2802.

27-1-504 through 27-1-510 reserved.

27-1-511. Right of minor to bring civil action or other proceeding. A minor may enforce his rights by civil action or other legal proceedings in the same manner as a person of full age except that a guardian must conduct the same.

History: En. Sec. 25, Civ. C. 1895; re-en. Sec. 3599, Rev. C. 1907; re-en. Sec. 5687, R.C.M. 1921; Cal. Civ. C. Sec. 42; Field Civ. C. Sec. 25; re-en. Sec. 5687, R.C.M. 1935; R.C.M. 1947, 64-114.

27-1-512. Action by parent or guardian for injury to or death of child or ward. Either parent may maintain an action for the injury or death of a minor child and a guardian for injury or death of a ward when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death or, if such person be employed by another person who is responsible for his conduct, also against such other person.

History: En. Sec. 11, p. 44, Bannack Stat.; amd. Sec. 11, p. 136, L. 1867; re-en. Sec. 11, p. 29, Cod. Stat. 1871; re-en. Sec. 13, p. 42, L. 1877; re-en. Sec. 13, 1st Div. Rev. Stat. 1879; re-en. Sec. 13, 1st Div. Comp. Stat. 1887; amd. Sec. 578, C. Civ. Proc. 1895; re-en. Sec. 6485, Rev. C. 1907; re-en. Sec. 9075, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 376; re-en. Sec. 9075, R.C.M. 1935; amd. Sec. 52, Ch. 535, L. 1975; R.C.M. 1947, 93-2809.

27-1-513. Action for wrongful death of adult. When the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death or, if such person be employed by another person who is responsible for his conduct, then also against such other person.

History: En. Sec. 1, p. 561, Cod. Stat. 1871; en. Sec. 14, p. 42, L. 1877; re-en. Sec. 14, 1st Div. Rev. Stat. 1879; re-en. Sec. 14, 1st Div. Comp. Stat. 1887; re-en.

Sec. 579, C. Civ. Proc. 1895; re-en. Sec. 6486, Rev. C. 1907; re-en. Sec. 9076, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 377; re-en. Sec. 9076, R.C.M. 1935; R.C.M. 1947, 93-2810(part).

27-1-514. Who may sue for whose seduction. (1) The rights of personal relations forbid the seduction of a spouse, child, orphan, or servant.

(2) Either parent may prosecute as plaintiff for the seduction of the child and the guardian for the seduction of the ward, though the child or ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards and there be no loss of service.

(3) An unmarried person may prosecute as plaintiff an action for his or her own seduction and may recover therein such damages, pecuniary or exemplary, as are assessed in such person's favor.

History: (1)En. Sec. 35, Civ. C. 1895; re-en. Sec. 3605, Rev. C. 1907; re-en. Sec. 5693, R.C.M. 1921; Cal. Civ. C. Sec. 49; Field Civ. C. Sec. 32; re-en. Sec. 5693, R.C.M. 1935; amd. Sec. 30, Ch. 535, L. 1975; Sec. 64-209, R.C.M. 1947; (2)En. Sec. 12, p. 41, L. 1877; re-en. Sec. 12, 1st Div. Rev. Stat. 1879; re-en. Sec. 12, 1st Div. Comp. Stat. 1887; re-en. Sec. 577, C. Civ. Proc. 1895; re-en. Sec. 6484, Rev. C. 1907; re-en. Sec. 9074, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 375; re-en. Sec. 9074, R.C.M. 1935; amd. Sec. 51, Ch. 535, L. 1975; Sec. 92-2808, R.C.M. 1947; (3)En. Sec. 11, p. 41, L. 1877; re-en. Sec. 11, 1st Div. Rev. Stat. 1879; re-en. Sec. 11, 1st Div. Comp. Stat. 1887; re-en. Sec. 576, C. Civ. Proc. 1895; re-en. Sec. 6483, Rev. C. 1907; re-en. Sec. 9073, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 374; re-en. Sec. 9073, R.C.M. 1935; amd. Sec. 50, Ch. 535, L. 1975; Sec. 93-2807, R.C.M. 1947; R.C.M. 1947, 64-209(3), 93-2807, 93-2808.

27-1-515. Protection of personal relations — abduction. The rights of personal relations forbid:

(1) the abduction of a parent from a child;

(2) the abduction or enticement of a wife from her husband or a husband from his wife, of a child from a parent or from a guardian entitled to its custody, or of a servant from a master.

History: En. Sec. 35, Civ. C. 1895; re-en. Sec. 3605, Rev. C. 1907; re-en. Sec. 5693, R.C.M. 1921; Cal. Civ. C. Sec. 49; Field Civ. C. Sec. 32; re-en. Sec. 5693, R.C.M. 1935; amd. Sec. 30, Ch. 535, L. 1975; R.C.M. 1947, 64-209(1), (2).

27-1-516. Injury to servant. The rights of personal relations forbid any injury to a servant which affects the servant's ability to serve the master.

History: En. Sec. 35, Civ. C. 1895; re-en. Sec. 3605, Rev. C. 1907; re-en. Sec. 5693, R.C.M. 1921; Cal. Civ. C. Sec. 49; Field Civ. C. Sec. 32; re-en. Sec. 5693, R.C.M. 1935; amd. Sec. 30, Ch. 535, L. 1975; R.C.M. 1947, 64-209(4).

Part 6

Abolition of Certain Causes of Action

27-1-601. Cause of action for alienation of affections abolished. All civil causes of action for alienation of affections of husband or wife are hereby abolished.

History: En. Sec. 1, Ch. 200, L. 1963; R.C.M. 1947, 17-1201(part).

27-1-602. Cause of action for breach of promise abolished — right to damages for fraud and unjust enrichment preserved. All causes of action for breach of contract to marry are hereby abolished. However, where a plaintiff has suffered actual damage due to fraud or deceit or a defendant has been unjustly enriched, the plaintiff may maintain an action for fraud or deceit or unjust enrichment and recover therein only the actual damage proved or for the benefit wrongfully obtained or restitution of property wrongfully withheld where such action otherwise is maintainable under existing law.

History: En. Sec. 2, Ch. 200, L. 1963; R.C.M. 1947, 17-1202.

27-1-603. Acts within Montana not to give rise to abolished cause of action. No act done within this state after July 1, 1963, shall operate to give rise, either within or without this state, to any of the causes of action abolished by this part. No contract to marry which shall be made within this state after July 1, 1963, shall operate to give rise, either within or without this state, to any cause of action for breach thereof. It is the intention of this part to fix the effect, status, and character of such acts and contracts and to render them ineffective to support or give rise to any such causes of action within or without this state.

History: En. Sec. 3, Ch. 200, L. 1963; R.C.M. 1947, 17-1203.

27-1-604. Litigation and threat of litigation prohibited. Effective July 1, 1963, it shall be unlawful for any person, either as litigant or attorney, to file, cause to be filed, threaten to file, or threaten to cause to be filed in any court in this state any pleading or paper setting forth or seeking to recover upon any cause of action abolished or barred by this part, whether such cause of action arose within or without this state.

History: En. Sec. 4, Ch. 200, L. 1963; R.C.M. 1947, 17-1204.

27-1-605. Agreements settling or compromising abolished causes of action. (1) All contracts and instruments of every kind which, after July 1, 1963, may be executed within this state in payment, satisfaction, settlement, or compromise of any claim or cause of action abolished or barred by this part, whether such claim or cause of action arose within or without this state, are hereby declared to be contrary to the public policy of this state and absolutely void.

(2) It shall be unlawful to:

(a) cause, induce, or procure any person to execute such a contract or instrument;

(b) cause, induce, or procure any person to give, pay, transfer, or deliver any money or thing of value in payment, satisfaction, settlement, or compromise of any such claim or cause of action;

(c) receive, take, or accept any such money or thing of value in such payment, satisfaction, settlement, or compromise; or

(d) commence or cause to be commenced, either as litigant or attorney, in any court of this state any proceeding or action seeking to enforce or recover upon any such contract or instrument knowing it to be such, whether the same shall have been executed within or without this state.

(3) However, this section shall not apply to the payment, satisfaction, settlement, or compromise of any causes of action which are not abolished or barred by this part or any contracts or instruments heretofore executed or to the bona fide holder in due course of any negotiable instrument which may be executed after July 1, 1963.

History: En. Sec. 5, Ch. 200, L. 1963; R.C.M. 1947, 17-1205.

27-1-606. Criminal penalty. Any person who shall violate any of the provisions of this part shall be guilty of a misdemeanor and upon conviction therefor shall be punishable by a fine of not less than $100 or more than $1,000 or imprisonment for a term of not less than 1 year or more than 5 years, in the discretion of the court.

History: En. Sec. 6, Ch. 200, L. 1963; R.C.M. 1947, 17-1206.

Part 7

Liability

27-1-701. Liability for negligence as well as willful acts. Every one is responsible not only for the result of his willful acts but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person except so far as the latter has willfully or by want of ordinary care brought the injury upon himself. The extent of liability in such cases is defined by parts 2 and 3 of this chapter, subsections (1) through (3) of 69-11-121, 70-16-108, 70-27-207, and 70-27-208.

History: En. Sec. 2296, Civ. C. 1895; re-en. Sec. 5077, Rev. C. 1907; re-en. Sec. 7579, R.C.M. 1921; Cal. Civ. C. Sec. 1714; Based on Field Civ. C. Sec. 853; re-en. Sec. 7579, R.C.M. 1935; R.C.M. 1947, 58-607.

27-1-702. Comparative negligence — extent to which contributory negligence bars recovery in action for damages. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

History: En. 58-607.1 by Sec. 1, Ch. 60, L. 1975; R.C.M. 1947, 58-607.1.

27-1-703. Multiple defendants jointly and severally liable — right of contribution. (1) Whenever the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party is jointly and severally liable for the amount awarded to the claimant but has the right of contribution from any other party against whom recovery is allowed. Contribution shall be proportional to the negligence of the parties against whom recovery is allowed.

(2) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties against whom recovery is allowed is liable to contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party.

History: En. 58-607.2 by Sec. 1, Ch. 433, L. 1977; R.C.M. 1947, 58-607.2.

27-1-704 through 27-1-710 reserved.

27-1-711. Liability of minor or person of unsound mind for own torts — exemplary damages. A minor or person of unsound mind is civilly liable for a wrong done by him but is not liable in exemplary damages unless at the time of the act he was capable of knowing that it was wrongful.

History: En. Sec. 24, Civ. C. 1895; re-en. Sec. 3598, Rev. C. 1907; re-en. Sec. 5686, R.C.M. 1921; Cal. Civ. C. Sec. 41; re-en. Sec. 5686, R.C.M. 1935; R.C.M. 1947, 64-113.

27-1-712. Liability for damages for deceit. (1) One who willfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage which he thereby suffers.

(2) A deceit, within the meaning of subsection (1), is either:

(a) the suggestion as a fact of that which is not true by one who does not believe it to be true;

(b) the assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true;

(c) the suppression of a fact by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact; or

(d) a promise made without any intention of performing it.

(3) One who practices a deceit with intent to defraud the public or a particular class of persons is deemed to have intended to defraud every individual in that class who is actually misled by the deceit.

History: (1)En. Sec. 2291, Civ. C. 1895; re-en. Sec. 5072, Rev. C. 1907; re-en. Sec. 7574, R.C.M. 1921; Cal. Civ. C. Sec. 1709; Field Civ. C. Sec. 848; re-en. Sec. 7574, R.C.M. 1935; Sec. 58-602, R.C.M. 1947; (2)En. Sec. 2292, Civ. C. 1895; re-en. Sec. 5073, Rev. C. 1907; re-en. Sec. 7575, R.C.M. 1921; Cal. Civ. C. Sec. 1710; Field Civ. C. Sec. 849; re-en. Sec. 7575, R.C.M. 1935; Sec. 58-603, R.C.M. 1947; (3)En. Sec. 2293, Civ. C. 1895; re-en. Sec. 5074, Rev. C. 1907; re-en. Sec. 7576, R.C.M. 1921; Cal. Civ. C. Sec. 1711; Field Civ. C. Sec. 850; re-en. Sec. 7576, R.C.M. 1935; Sec. 58-604, R.C.M. 1947; R.C.M. 1947, 58-602, 58-603, 58-604.

27-1-713. Duty to restore thing wrongfully acquired or retained. One who obtains a thing without the consent of its owner, by a consent afterwards rescinded, or by an unlawful exaction which the owner could not at the time prudently refuse must restore it to the person from whom it was thus obtained unless he has acquired a title thereto superior to that of such other person or unless the transaction was corrupt and unlawful on both sides. The restoration required by this section must be made without demand except where a thing is obtained by mutual mistake, in which case the party obtaining the thing is not bound to return it until he has notice of the mistake.

History: Ap. p. Sec. 2294, Civ. C. 1895; re-en. Sec. 5075, Rev. C. 1907; re-en. Sec. 7577, R.C.M. 1921; Cal. Civ. C. Sec. 1712; Field Civ. C. Sec. 851; re-en. Sec. 7577, R.C.M. 1935; Sec. 58-605, R.C.M. 1947; Ap. p. Sec. 2295, Civ. C. 1895; re-en. Sec. 5076, Rev. C. 1907; re-en. Sec. 7578, R.C.M. 1921; Cal. Civ. C. Sec. 1713; Field Civ. C. Sec. 852; re-en. Sec. 7578, R.C.M. 1935; Sec. 58-606, R.C.M. 1947; R.C.M. 1947, 58-605, 58-606.

27-1-714. Limits on liability for emergency care rendered at scene of accident or emergency. Any person licensed as a physician and surgeon under the laws of the state of Montana or any other person who in good faith renders emergency care or assistance without compensation at the scene of an emergency or accident shall not be liable for any civil damages for acts or omissions other than damages occasioned by gross negligence or by willful or wanton acts or omissions by such person in rendering such emergency care.

History: En. Sec. 1, Ch. 93, L. 1963; R.C.M. 1947, 17-410.

27-1-715. Liability of owner of vicious dog. (1) The owner of any dog which shall without provocation bite any person while such person is on or in a public place or lawfully on or in a private place, including the property of the owner of such dog, located within an incorporated city or town shall be liable for such damages as may be suffered by the person bitten regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

(2) A person is lawfully upon the private property of such owner within the meaning of this section when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States of America or when he is on such property as an invitee or licensee of the person lawfully in possession of the property.

History: En. Sec. 1, Ch. 113, L. 1943; R.C.M. 1947, 17-409.

Part 8

Libel and Slander

27-1-801. Defamation — how effected. Defamation is effected by:
(1) libel;
(2) slander.

History: En. Sec. 31, Civ. C. 1895; re-en. Sec. 3601, Rev. C. 1907; re-en. Sec. 5689, R.C.M. 1921; Cal. Civ. C. Sec. 44; Field Civ. C. Sec. 28; re-en. Sec. 5689, R.C.M. 1935; R.C.M. 1947, 64-202.

27-1-802. Libel defined. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation.

History: En. Sec. 32, Civ. C. 1895; re-en. Sec. 3602, Rev. C. 1907; re-en. Sec. 5690, R.C.M. 1921; Cal. Civ. C. Sec. 45; Field Civ. C. 29; re-en. Sec. 5690, R.C.M. 1935; R.C.M. 1947, 64-203.

27-1-803. Slander defined. Slander is a false and unprivileged publication other than libel which:
(1) charges any person with crime or with having been indicted, convicted, or punished for crime;
(2) imputes in him the present existence of an infectious, contagious, or loathsome disease;
(3) tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit;
(4) imputes to him impotence or want of chastity; or
(5) by natural consequence causes actual damage.

History: En. Sec. 33, Civ. C. 1895; re-en. Sec. 3603, Rev. C. 1907; re-en. Sec. 5691, R.C.M. 1921; Cal. Civ. C. Sec. 46; Field Civ. C. Sec. 30; re-en. Sec. 5691, R.C.M. 1935; R.C.M. 1947, 64-204.

27-1-804. What communications are privileged. A privileged publication is one made:
(1) in the proper discharge of an official duty;
(2) in any legislative or judicial proceeding or in any other official proceeding authorized by law;
(3) in a communication without malice to a person interested therein by one who is also interested or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent or who is requested by the person interested to give the information;

(4) by a fair and true report without malice of a judicial, legislative, or other public official proceeding or of anything said in the course thereof.

History: En. Sec. 34, Civ. C. 1895; re-en. Sec. 3604, Rev. C. 1907; re-en. Sec. 5692, R.C.M. 1921; Cal. Civ. C. Sec. 47; Based on Field Civ. C. Sec. 31; re-en. Sec. 5692, R.C.M. 1935; R.C.M. 1947, 64-208.

27-1-805 through 27-1-810 reserved.

27-1-811. When owner of radio station not liable for material broadcast. No person, firm, or corporation owning or operating a radio broadcasting station shall be liable under the law of libel and defamation on account of having made its broadcasting facilities available to any person, whether a candidate for public office or any other person, for discussion of controversial or any other subjects in the absence of proof of actual malice on the part of such owner or operator.

History: En. Sec. 1, Ch. 122, L. 1939; R.C.M. 1947, 64-205.

27-1-812. Right of owner to require prior submission of text to be broadcast. Any person, firm, or corporation owning or operating a radio broadcasting station shall have the right but shall not be compelled to require the submission and permanent filing in such station of a copy of the complete address or other form of expression, if in words, intended to be broadcast over such station, not more than 48 hours before the time of the intended broadcast thereof.

History: En. Sec. 2, Ch. 122, L. 1939; R.C.M. 1947, 64-206.

27-1-813. Liability of person broadcasting — liability of owner for broadcast prepared by station. Nothing in 27-1-811 or 27-1-812 contained shall be construed to relieve any person broadcasting over a radio station from liability under the law of libel and defamation. Nor shall anything in 27-1-811 or 27-1-812 be construed to relieve any person, firm, or corporation owning or operating a radio broadcasting station from liability under the law of libel and defamation on account of any broadcast prepared or made by any such person, firm, or corporation or by any officer or employee thereof in the course of his employment; and in any case where liability shall exist on account of any broadcast as declared in the first clause of this sentence, in that event where two or more broadcasting stations were connected together simultaneously or by transcription, film, metal tape, or other approved or adapted use for joint operation in the making of such broadcast, such liability shall be confined and limited solely to the person, firm, or corporation owning or operating the radio station which originated such broadcast.

History: En. Sec. 3, Ch. 122, L. 1939; R.C.M. 1947, 64-207.

27-1-814. Media management to be given opportunity to publish correction prior to action for libel or slander. Before any civil action shall be commenced on account of any libelous or defamatory publication in any newspaper, magazine, periodical, radio or television station, or cable television system, the libeled person shall first give those alleged to be responsible or liable for the publication a reasonable opportunity to correct the libelous or defamatory matter. Such opportunity shall be given by notice in writing specifying the article and the statements therein which are claimed to be false and defamatory and a statement of what are claimed to be the true facts. The notice may also state the sources, if any, from which the true facts may be ascertained with definiteness and certainty.

History: En. Sec. 1, Ch. 159, L. 1961; amd. Sec. 1, Ch. 58, L. 1971; R.C.M. 1947, 64-207.1(part).

27-1-815. What constitutes a reasonable time for correction. The first issue of a newspaper, magazine, or periodical published after the expiration of 1 week from the receipt of such notice shall be within a reasonable time for correction. In the case of radio and television stations and cable television systems, a broadcast made at the same time of day as the broadcast complained of and of at least equal duration which is made within 7 days following receipt of such notice shall be within a reasonable time for correction.

History: En. Sec. 1, Ch. 159, L. 1961; amd. Sec. 1, Ch. 58, L. 1971; R.C.M. 1947, 64-207.1(part).

27-1-816. Content of correction. To the extent that the true facts are, with reasonable diligence, ascertainable with definiteness and certainty, only a retraction shall constitute a correction; otherwise the publication of the libeled person's statement of the true facts or so much thereof as shall not be libelous of another, scurrilous, or otherwise improper for publication, published as his statement, shall constitute a correction within the meaning of 27-1-814 through 27-1-817.

History: En. Sec. 1, Ch. 159, L. 1961; amd. Sec. 1, Ch. 58, L. 1971; R.C.M. 1947, 64-207.1(part).

27-1-817. Extent to which a correction is a defense upon trial. If it shall appear upon trial that the publication was made under honest mistake or misapprehension, then a correction timely published without comment in a position and type as prominent as the alleged libel or in a broadcast made at the same time of day as the broadcast complained of and of at least equal duration shall constitute a defense against the recovery of any damages except actual damages, as well as being competent and material in mitigation of actual damages to the extent the correction published does so mitigate them.

History: En. Sec. 1, Ch. 159, L. 1961; amd. Sec. 1, Ch. 58, L. 1971; R.C.M. 1947, 64-207.1(part).

CHAPTER 2

STATUTES OF LIMITATIONS

Part 1 — General Provisions

Section
27-2-101. Definition of action.
27-2-102. When action commenced.
27-2-103. Actions by state subject to limitations.
27-2-104. Application of this state's statutes of limitations — actions against nonresidents.
27-2-105. Periods of limitation.

Part 2 — Time Limits on Specific Kinds of Actions

27-2-201. Actions upon judgments.
27-2-202. Actions based on contract or other obligation.
27-2-203. Actions for relief on ground of fraud or mistake.
27-2-204. Tort actions — general and personal injury.
27-2-205. Actions for medical malpractice.
27-2-206. Actions for legal malpractice.
27-2-207. Tort actions involving property.
27-2-208. Actions for damages arising out of work on improvements to real property.
27-2-209. Actions against local government or local government official.
27-2-210. Actions arising from the seizure or sale of property for taxes.

27-2-211. Actions to enforce penalty or forfeiture or other statutory liability.
27-2-212. Actions arising from wrongful removal or exclusion from office.
27-2-213. Actions against banks.
27-2-214. Actions for mesne profits of real property.
27-2-215. Other actions.

Part 3 — Accrual of Cause of Action

27-2-301. When demand necessary to perfect right to action.
27-2-302. Actions based on mutual accounts.
27-2-303. Actions for waste, trespass, or injury committed during mining work or exploration.
27-2-304. Actions involving personal property accruing after death and before issuance of letters of administration.

Part 4 — Circumstances Which Extend Period of Limitations

27-2-401. When person entitled to bring action is under a disability.
27-2-402. When defendant is out of state.
27-2-403. Actions involving aliens in time of war.
27-2-404. When a party dies before action commenced.
27-2-405. When controversy submitted to arbitration.
27-2-406. When action stayed by injunction or other order or statutory prohibition.
27-2-407. When action terminated or judgment reversed.
27-2-408. Effect on counterclaim of termination of action.
27-2-409. Acknowledgment of debt or part payment.

Part 1

General Provisions

27-2-101. Definition of action. The word "action", as used in this chapter, 7-7-105(1), 7-32-4121, 17-5-1001, and 20-9-465, is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature.

History: En. Sec. 559, C. Civ. Proc. 1895; re-en. Sec. 6476, Rev. C. 1907; re-en. Sec. 9066, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 363; re-en. Sec. 9066, R.C.M. 1935; R.C.M. 1947, 93-2720.

27-2-102. When action commenced. An action is commenced, within the meaning of [this chapter], when the complaint is filed.

History: En. Sec. 540, C. Civ. Proc. 1895; re-en. Sec. 6457, Rev. C. 1907; re-en. Sec. 9047, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 350; re-en. Sec. 9047, R.C.M. 1935; R.C.M. 1947, 93-2701.

27-2-103. Actions by state subject to limitations. The limitations prescribed in 27-2-201 through 27-2-204, 27-2-207, 27-2-209 through 27-2-211(2), and 27-2-212 through 27-2-215 apply to actions brought in the name of the state or for the benefit of the state in the same manner as to actions by private parties.

History: En. Sec. 49, p. 50, L. 1877; re-en. Sec. 49, 1st Div. Rev. Stat. 1879; re-en. Sec. 49, 1st Div. Comp. Stat. 1887; re-en. Sec. 520, C. Civ. Proc. 1895; re-en. Sec. 6453, Rev. C. 1907; re-en. Sec. 9043, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 345; re-en. Sec. 9043, R.C.M. 1935; R.C.M. 1947, 93-2615.

27-2-104. Application of this state's statutes of limitations — actions against nonresidents. Where a cause of action which does not involve the title to or possession of real property within the state accrues against a person who is not then a resident of the state, an action cannot be brought thereon in a court of the state against him or his personal representative after the expiration of the time limited by the laws of his residence for bringing a like action except by a resident of the state and in one of the following cases:

(1) where the cause of action originally accrued in favor of a resident of the state;

(2) where, before the expiration of the time so limited, the person in whose favor it originally accrued was or became a resident of the state or the cause of action was assigned to and thereafter continuously owned by a resident of the state.

History: En. Sec. 556, C. Civ. Proc. 1895; re-en. Sec. 6473, Rev. C. 1907; re-en. Sec. 9063, R.C.M. 1921; re-en. Sec. 9063, R.C.M. 1935; R.C.M. 1947, 93-2717.

27-2-105. Periods of limitation. The periods prescribed for the commencement of actions, other than for the recovery of real property, are as follows.

History: En. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; R.C.M. 1947, 93-2601.

Part 2

Time Limits on Specific Kinds of Actions

27-2-201. Actions upon judgments. (1) The period prescribed for the commencement of an action upon a judgment or decree of any court of record of the United States or of any state within the United States is within 10 years.

(2) The period prescribed for the commencement of an action upon a judgment or decree rendered in a court not of record is within 5 years. The cause of action is deemed, in such case, to have accrued when final judgment was rendered.

History: Ap. p. Sec. 1, p. 172, L. 1889; amd. Sec. 511, C. Civ. Proc. 1895; re-en. Sec. 6444, Rev. C. 1907; re-en. Sec. 9028; R.C.M. 1921; Cal. C. Civ. Proc. Sec. 336; re-en. Sec. 9028, R.C.M. 1935; Sec. 93-2602, R.C.M. 1947; Ap. p. Sec. 513, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 157, L. 1901; amd. Sec. 1, Ch. 128, L. 1903; re-en. Sec. 6446, Rev. C. 1907; re-en. Sec. 9030, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 339; re-en. Sec. 9030, R.C.M. 1935; amd. Sec. 13, Ch. 263, L. 1975; Sec. 93-2604, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2602(1), 93-2604(2).

27-2-202. Actions based on contract or other obligation. (1) The period prescribed for the commencement of an action upon any contract, obligation, or liability founded upon an instrument in writing is within 8 years.

(2) The period prescribed for the commencement of an action upon a contract, account, promise not founded on an instrument in writing is within 5 years.

(3) The period prescribed for the commencement of an action upon an obligation or liability not founded upon an instrument in writing, other than a contract, account, or promise, is within 3 years.

History: Ap. p. Sec. 1, p. 172, L. 1889; re-en. Sec. 512, C. Civ. Proc. 1895; re-en. Sec. 6445, Rev. C. 1907; re-en. Sec. 9029, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 337; re-en. Sec. 9029, R.C.M. 1935; Sec. 93-2603, R.C.M. 1947; Ap. p. Sec. 513, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 157, L. 1901; amd. Sec. 1, Ch. 128, L. 1903; re-en.

Sec. 6446, Rev. C. 1907; re-en. Sec. 9030, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 339; re-en. Sec. 9030, R.C.M. 1935; amd. Sec. 13, Ch. 263, L. 1975; Sec. 93-2604, R.C.M. 1947; Ap. p. Sec. 514, C. Civ. Proc. 1895; amd. Sec. 2, p. 157, L. 1901; amd. Sec. 2, Ch. 128, L. 1903; re-en. Sec. 6447, Rev. C. 1907; re-en. Sec. 9031, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 339; re-en. Sec. 9031, R.C.M. 1935; Sec. 93-2605, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2603, 93-2604(1), 93-2605(3).

27-2-203. Actions for relief on ground of fraud or mistake. The period prescribed for the commencement of an action for relief on the ground of fraud or mistake is within 2 years, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

History: Ap. p. Sec. 1, p. 50, L. 1893; re-en. Sec. 524, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 128, L. 1903; re-en. Sec. 6449, Rev. C. 1907; amd. Sec. 1, Ch. 47, L. 1917; amd. Sec. 1, Ch. 172, L. 1921; re-en. Sec. 9033, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 338; re-en. Sec. 9033, R.C.M. 1935; amd. Sec. 1, Ch. 423, L. 1975; Sec. 93-2607, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2607(4).

27-2-204. Tort actions — general and personal injury. (1) The period prescribed for the commencement of an action upon an obligation or liability not founded upon an instrument in writing, other than a contract, account, or promise, is within 3 years.

(2) The period prescribed for the commencement of an action to recover damages for the death of one caused by the wrongful act or neglect of another is within 3 years.

(3) The period prescribed for the commencement of an action for libel, slander, assault, battery, false imprisonment, or seduction is within 2 years.

History: (1)En. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; (2)En. Sec. 514, C. Civ. Proc. 1895; amd. Sec. 2, p. 157, L. 1901; amd. Sec. 2, Ch. 128, L. 1903; re-en. Sec. 6447, Rev. C. 1907; re-en. Sec. 9031, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 339; re-en. Sec. 9031, R.C.M. 1935; Sec. 93-2605, R.C.M. 1947; (3)En. Sec. 515, C. Civ. Proc. 1895; re-en. Sec. 6448, Rev. C. 1907; re-en. Sec. 9032, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 340; re-en. Sec. 9032, R.C.M. 1935; Sec. 93-2606, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2605(2), (3), 93-2606(3).

27-2-205. Actions for medical malpractice. Action for injury or death against a physician or surgeon, dentist, registered nurse, nursing home administrator, dispensing optician, optometrist, licensed physical therapist, podiatrist, psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, pharmacist, veterinarian, a licensed hospital or long-term care facility as the employer of any such person, based upon such person's alleged professional negligence or for rendering professional services without consent or for error or omission in such person's practice, shall be commenced within 3 years after the date of injury or 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs last, but in no case may such action be commenced after 5 years from the date of injury. However, this time limitation shall be tolled for any period during which such person has failed to disclose any act, error, or omission upon which such action is based and which is known to him or through the use of reasonable diligence subsequent to said act, error, or omission would have been known to him.

History: En. Sec. 1, Ch. 328, L. 1971; amd. Sec. 1, Ch. 191, L. 1973; R.C.M. 1947, 93-2624.

27-2-206. Actions for legal malpractice. An action against an attorney licensed to practice law in Montana or a paralegal assistant or a legal intern employed by an attorney based upon the person's alleged professional negligent act or for error or omission in the person's practice must be commenced within 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the act, error, or omission, whichever occurs last, but in no case may the action be commenced after 10 years from the date of the act, error, or omission.

History: En. 93-2625 by Sec. 1, Ch. 220, L. 1977; R.C.M. 1947, 93-2625.

27-2-207. Tort actions involving property. Within 2 years is the period prescribed for the commencement of an action for:

(1) injury to or waste or trespass on real or personal property;

(2) taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property;

(3) killing or injuring stock by a railroad corporation or company.

History: Ap. p. Sec. 1, p. 50, L. 1893; re-en. Sec. 524, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 128, L. 1903; re-en. Sec. 6449, Rev. C. 1907; amd. Sec. 1, Ch. 47, L. 1917; amd. Sec. 1, Ch. 172, L. 1921; re-en. Sec. 9033, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 338; re-en. Sec. 9033, R.C.M. 1935; amd. Sec. 1, Ch. 423, L. 1975; Sec. 93-2607, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2607(part).

27-2-208. Actions for damages arising out of work on improvements to real property. (1) Except as provided in subsections (2) and (3), no action to recover damages (other than an action upon any contract, obligation, or liability founded upon an instrument in writing) resulting from or arising out of the design, planning, supervision, inspection, construction, or observation of construction of or land surveying done in connection with any improvement to real property shall be commenced more than 10 years after completion of such improvement.

(2) Notwithstanding the provisions of subsection (1), an action for such damages for an injury which occurred during the 10th year after such completion may be commenced within 1 year after the occurrence of such injury.

(3) The limitation prescribed by this section shall not affect the responsibility of any owner, tenant, or person in actual possession and control of the improvement at the time a right of action arises.

(4) As used in this section, the term "completion" means that degree of completion at which the owner can utilize the improvement for the purpose for which it was intended or when a completion certificate is executed, whichever is earlier.

(5) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

History: En. Secs. 1, 2, 3, 4, 5, Ch. 60, L. 1971; R.C.M. 1947, 93-2619, 93-2620, 93-2621, 93-2622, 93-2623.

27-2-209. Actions against local government or local government official. (1) The period prescribed for the commencement of an action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and in virtue of his office or by the omission of an official duty, including the nonpayment of money collected upon an execution, is within 3 years; but this subsection does not apply for an action for an escape.

(2) The period prescribed for the commencement of an action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process is within 1 year.

(3) Actions for claims against a county which have been rejected by the county commissioners must be commenced within 6 months after the first rejection thereof by such board.

(4) The period prescribed for the commencement of an action against a municipal corporation for damages or injuries to property caused by a mob or riot is within 1 year.

History: Ap. p. Sec. 514, C. Civ. Proc. 1895; amd. Sec. 2, p. 157, L. 1901; amd. Sec. 2, Ch. 128, L. 1903; re-en. Sec. 6447, Rev. C. 1907; re-en. Sec. 9031, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 339; re-en. Sec. 9031, R.C.M. 1935; Sec. 93-2605, R.C.M. 1947; Ap. p. Sec. 516, C. Civ. Proc. 1895; amd. Sec. 1, p. 144, L. 1899; re-en. Sec. 6450, Rev. C. 1907; amd. Sec. 2, Ch. 47, L. 1917; re-en. Sec. 9034, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 340; re-en. Sec. 9034, R.C.M. 1935; Sec. 93-2608, R.C.M. 1947; Ap. p. Sec. 517, C. Civ. Proc. 1895; amd. Sec. 1, p. 144, L. 1899; re-en. Sec. 6450a, Rev. C. 1907; re-en. Sec. 9035, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 341, 342; amd. Sec. 1, Ch. 27, L. 1933; re-en. Sec. 9035, R.C.M. 1935; Sec. 93-2609, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2605(1), 93-2608(part), 93-2609(2).

27-2-210. Actions arising from the seizure or sale of property for taxes. (1) Within 1 year is the period prescribed for the commencement of an action against an officer or officer de facto:

(a) to recover any goods, wares, merchandise, or other property seized by any such officer in his official capacity as tax collector;

(b) to recover the price or value of any goods, wares, merchandise, or other personal property so seized;

(c) for damages for the seizure, detention, or sale of or injury to any goods, wares, merchandise, or other personal property seized; or

(d) for damages done to any person or property in making any such seizure.

(2) The period prescribed for the commencement of an action to recover stock sold for a delinquent assessment is within 6 months.

History: Ap. p. Sec. 516, C. Civ. Proc. 1895; amd. Sec. 1, p. 144, L. 1899; re-en. Sec. 6450, Rev. C. 1907; amd. Sec. 2, Ch. 47, L. 1917; re-en. Sec. 9034, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 340; re-en. Sec. 9034, R.C.M. 1935; Sec. 93-2608, R.C.M. 1947; Ap. p. Sec. 517, C. Civ. Proc. 1895; amd. Sec. 1, p. 144, L. 1899; re-en. Sec. 6450a, Rev. C. 1907; re-en. Sec. 9035, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 341, 342; amd. Sec. 1, Ch. 27, L. 1933; re-en. Sec. 9035, R.C.M. 1935; Sec. 93-2609, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2608(3), 93-2609(1).

27-2-211. Actions to enforce penalty or forfeiture or other statutory liability. (1) Within 2 years is the period prescribed for the commencement of an action upon:

(a) a statute for a penalty or forfeiture when the action is given to an individual or to an individual and the state except when the statute imposing it prescribes a different limitation;

(b) a statute or an undertaking in a criminal action for a forfeiture or penalty to the state;

(c) a liability created by statute other than a penalty or forfeiture.

(2) The period prescribed for the commencement of an action by a municipal corporation for the violation of any city or town ordinance is within 1 year.

(3) [Sections 93-2401 to 93-2720] do not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed or to enforce a liability created by law, but such actions must be brought within 3 years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached or the liability was created.

History: Ap. p. Sec. 515, C. Civ. Proc. 1895; re-en. Sec. 6448, Rev. C. 1907; re-en. Sec. 9032, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 340; re-en. Sec. 9032, R.C.M. 1935; Sec. 93-2606, R.C.M. 1947; Ap. p. Sec. 1, p. 50, L. 1893; re-en. Sec. 524, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 128, L. 1903; re-en. Sec. 6449, Rev. C. 1907; amd. Sec. 1, Ch. 47, L. 1917; amd. Sec. 1, Ch. 172, L. 1921; re-en. Sec. 9033, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 338; re-en. Sec. 9033, R.C.M. 1935; amd. Sec. 1, Ch. 423, L. 1975; Sec. 93-2607, R.C.M. 1947; Ap. p. Sec. 516, C. Civ. Proc. 1895; amd. Sec. 1, p. 144, L. 1899; re-en. Sec. 6450, Rev. C. 1907; amd. Sec. 2, Ch. 47, L. 1917; re-en. Sec. 9034, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 340; re-en. Sec. 9034, R.C.M. 1935; Sec. 93-2608, R.C.M. 1947; Ap. p. Sec. 554, C. Civ. Proc. 1895; re-en. Sec. 6471, Rev. C. 1907; re-en. Sec. 9061, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 359; re-en. Sec. 9061, R.C.M. 1935; Sec. 93-2715, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2606(1), (2), 93-2607(1), 93-2608(part), 93-2715.

27-2-212. Actions arising from wrongful removal or exclusion from office. Within 6 months is the period prescribed for the commencement of:

(1) any action for the restoration to office by any person wrongfully or illegally removed or excluded from office;

(2) any suit for the recovery of salary or other emoluments of office by any person having been wrongfully or illegally removed or excluded from office.

History: Ap. p. Sec. 517, C. Civ. Proc. 1895; amd. Sec. 1, p. 144, L. 1899; re-en. Sec. 6450a, Rev. C. 1907; re-en. Sec. 9035, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 341, 342; amd. Sec. 1, Ch. 27, L. 1933; re-en. Sec. 9035, R.C.M. 1935; Sec. 93-2609, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2609(3), (4).

27-2-213. Actions against banks. To actions brought to recover money or other property deposited with any bank, banker, trust company, or savings and loan corporation, association, or society, there are no limitations. However, any action to obtain, set aside, or question in any manner any stated or settled account between any bank, banker, trust company, or savings or loan corporation, association, or society and any depositor or depositors with such bank, banker, trust company, or savings or loan corporation, association, or society must be commenced within 5 years from the date of the statement of such account. Any action based upon or arising from the payment of any bank, banker, company, corporation, association, or society of a forged, raised, or otherwise altered check, order, or promissory note out of the deposit, money, or property of the plaintiff shall be brought within 3 years from the day on which the plaintiff, his agent, assignee, or personal representative shall have been notified of such payment or on which he or they shall have received such check, order, or note marked "paid".

History: En. Sec. 523, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 78, L. 1905; Re-en. Sec. 6456, Rev. C. 1907; re-en. Sec. 9046, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 348; re-en. Sec. 9046, R.C.M. 1935; R.C.M. 1947, 93-2618.

27-2-214. Actions for mesne profits of real property. The period prescribed for the commencement of an action for mesne profits of real property is within 10 years.

History: Ap. p. Sec. 1, p. 172, L. 1889; amd. Sec. 511, C. Civ. Proc. 1895; re-en. Sec. 6444, Rev. C. 1907; re-en. Sec. 9028; R.C.M. 1921; Cal. C. Civ. Proc. Sec. 336; re-en. Sec. 9028, R.C.M. 1935; Sec. 93-2602, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2602(2).

27-2-215. Other actions. An action for relief not hereinbefore provided for must be commenced within 5 years after the cause of action shall have accrued.

History: En. Sec. 518, C. Civ. Proc. 1895; re-en. Sec. 6451, Rev. C. 1907; re-en. Sec. 9041, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 343; re-en. Sec. 9041, R.C.M. 1935; R.C.M. 1947, 93-2613.

Part 3

Accrual of Cause of Action

27-2-301. When demand necessary to perfect right to action. Where a right exists but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete except in one of the following cases:

(1) Where the right grows out of the receipt or detention of money or property by an agent, trustee, attorney, or other person acting in a fiduciary capacity, the time must be computed from the time when the person having the right to make the demand has actual knowledge of the facts upon which that right depends.

(2) Where there was a deposit of money not to be paid at a fixed time but only upon a special demand or a delivery of personal property not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency, the time must be computed from the demand.

History: En. Sec. 551, C. Civ. Proc. 1895; re-en. Sec. 6468, Rev. C. 1907; re-en. Sec. 9058, R.C.M. 1921; re-en. Sec. 9058, R.C.M. 1935; R.C.M. 1947, 93-2712.

27-2-302. Actions based on mutual accounts. In an action brought to recover a balance due upon a mutual, open, and current account where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side.

History: En. Sec. 48, p. 50, L. 1877; re-en. Sec. 48, 1st Div. Rev. Stat. 1879; re-en. Sec. 48, 1st Div. Comp. Stat. 1887; re-en. Sec. 519, C. Civ. Proc. 1895; re-en. Sec. 6452, Rev. C. 1907; re-en. Sec. 9042, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 344; re-en. Sec. 9042, R.C.M. 1935; R.C.M. 1947, 93-2614.

27-2-303. Actions for waste, trespass, or injury committed during mining work or exploration. When waste, trespass, or injury is committed by reason of underground work upon any mining claim or seismic exploration, location, spacing, drilling, equipping, producing, or other operation related to exploration or production of oil, gas, water, geothermal, or other minerals, the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such waste, trespass, or injury.

History: En. Sec. 1, p. 50, L. 1893; re-en. Sec. 524, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 128, L. 1903; re-en. Sec. 6449, Rev. C. 1907; amd. Sec. 1, Ch. 47, L. 1917;

amd. Sec. 1, Ch. 172, L. 1921; re-en. Sec. 9033, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 338; re-en. Sec. 9033, R.C.M. 1935; amd. Sec. 1, Ch. 423, L. 1975; R.C.M. 1947, 93-2607(part).

27-2-304. Actions involving personal property accruing after death and before issuance of letters of administration. For the purpose of computing the time within which an action must be commenced in a court of this state by an executor or administrator to recover personal property taken after the death of a testator or intestate and before the issuing of letters testamentary or letters of administration or to recover damages for taking, detaining, or injuring personal property within the same period, the letters are deemed to have been issued within 5 years after the death of the testator or intestate.

History: En. Sec. 545, C. Civ. Proc. 1895; re-en. Sec. 6462, Rev. C. 1907; re-en. Sec. 9052, R.C.M. 1921; re-en. Sec. 9052, R.C.M. 1935; R.C.M. 1947, 93-2706(part).

Part 4

Circumstances Which Extend Period of Limitations

27-2-401. When person entitled to bring action is under a disability. (1) If a person entitled to bring an action mentioned in part 2, except 27-2-211(3), be, at the time the cause of action accrued, either within the age of majority, insane, or imprisoned on a criminal charge or in execution under the sentence of a criminal court for a term less than for life, the time of such disability is not a part of the time limited in [93-2401 to 93-2720] for commencing the action, except that the time so limited cannot be extended more than 5 years by any such disability except infancy or, in any case, more than 1 year after the disability ceases.

(2) Where an action is barred by 27-2-304, any of the next of kin, legatees, or creditors who, at the time of the transaction upon which it might have been founded, was within the age of majority, insane, or imprisoned on a criminal charge may, within 5 years after the cessation of such disability, maintain an action to recover damages by reason thereof, in which he may recover such sum or the value of such property as he would have received upon the final distribution of the estate if an action had been seasonably commenced by the executor or administrator.

(3) No person can avail himself of a disability unless it existed when his right of action or entry accrued.

(4) When two or more disabilities coexist at the time the right of action or entry accrues, the limitation does not attach until they are removed.

History: (1)En. Sec. 14, p. 468, Bannack Stat.; re-en. Sec. 12, p. 517, Cod. Stat. 1871; repealed Sec. 674, p. 215, L. 1877; re-en. Sec. 542, C. Civ. Proc. 1895; re-en. Sec. 6459, Rev. C. 1907; re-en. Sec. 9049, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 352; re-en. Sec. 9049, R.C.M. 1935; amd. Sec. 2, Ch. 220, L. 1977; Sec. 93-2703, R.C.M. 1947; (2)En. Sec. 545, C. Civ. Proc. 1895; re-en. Sec. 6462, Rev. C. 1907; re-en. Sec. 9052, R.C.M. 1921; re-en. Sec. 9052, R.C.M. 1935; Sec. 93-2706, R.C.M. 1947; (3)En. Sec. 19, p. 469, Bannack Stat.; re-en. Sec. 17, p. 518, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 549, C. Civ. Proc. 1895; re-en. Sec. 6466, Rev. C. 1907; re-en. Sec. 9056, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 357; re-en. Sec. 9056, R.C.M. 1935; Sec. 93-2710, R.C.M. 1947; (4)En. Sec. 20, p. 469, Bannack Stat.; re-en. Sec. 18, p. 518, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 550, C. Civ. Proc. 1895; re-en. Sec. 6467, Rev. C. 1907; re-en. Sec. 9057, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 358; re-en. Sec. 9057, R.C.M. 1935; Sec. 93-2711, R.C.M. 1947; R.C.M. 1947, 93-2703, 93-2706(part), 93-2710, 93-2711.

27-2-402. When defendant is out of state. If when the cause of action accrues against a person he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if after the cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

History: En. Sec. 13, p. 468, Bannack Stat.; re-en. Sec. 11, p. 517, Cod. Stat. 1871; re-en. Sec. 50, p. 50, L. 1877; re-en. Sec. 50, 1st Div. Rev. Stat. 1879; re-en. Sec. 50, 1st Div. Comp. Stat. 1887; re-en. Sec. 541, C. Civ. Proc.1895; re-en. Sec. 6458, Rev. C. 1907; re-en. Sec. 9048, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 351; re-en. Sec. 9048, R.C.M. 1935; R.C.M. 1947, 93-2702.

27-2-403. Actions involving aliens in time of war. When a person is an alien subject or a citizen of a country at war with the United States, the time of the continuance of the war is not part of the period limited for the commencement of the action.

History: En. Sec. 16, p. 469, Bannack Stat.; re-en. Sec. 14, p. 517, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 546, C. Civ. Proc. 1895; re-en. Sec. 6463, Rev. C. 1907; re-en. Sec. 9053, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 354; re-en. Sec. 9053, R.C.M. 1935; R.C.M. 1947, 93-2707.

27-2-404. When a party dies before action commenced. (1) If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced by his representatives after the expiration of that time and within 1 year from his death.

(2) If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced against his representatives after the expiration of that time and within 1 year after the issuing of letters testamentary or of administration. If a person against whom a cause of action exists dies without the state, the time which elapses between his death and the expiration of 1 year after the issuing within the state of letters testamentary or letters of administration is not a part of the time limited for the commencement of an action therefor against his executor or administrator.

History: Ap. p. Sec. 15, p. 468, Bannack Stat.; re-en. Sec. 13, p. 517, Cod. Stat. 1871; repealed Sec. 674, p. 215, L. 1877; re-en. Sec. 543, C. Civ. Proc. 1895; re-en. Sec. 6460, Rev. C. 1907; re-en. Sec. 9050, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 353; re-en. Sec. 9050, R.C.M. 1935; Sec. 93-2704, R.C.M. 1947; Ap. p. Sec. 544, C. Civ. Proc. 1895; re-en. Sec. 6461, Rev. C. 1907; re-en. Sec. 9051, R.C.M. 1921; re-en. Sec. 9051, R.C.M. 1935; Sec. 93-2705, R.C.M. 1947; R.C.M. 1947, 93-2704, 93-2705.

27-2-405. When controversy submitted to arbitration. Where the persons who might be adverse parties in an action have entered into a written agreement to submit to arbitration or to refer the cause of action or a controversy in which it might be available or have entered into a written submission thereof to arbitrators and, before an award or other determination thereupon, the agreement or submission is revoked, so as to render it ineffectual, by the death of either party thereto or by the act of the person against whom the action might have been brought or the execution thereof or the remedy upon an award or other determination thereunder is stayed by injunction or other order procured by him from a competent court or judge, the time which has elapsed between the entering into the written submission or agreement and the revocation thereof or the expiration of the stay is not a part of the time limited for the commencement of the action.

History: En. Sec. 552, C. Civ. Proc. 1895; re-en. Sec. 6469, Rev. C. 1907; re-en. Sec. 9059, R.C.M. 1921; re-en. Sec. 9059, R.C.M. 1935; R.C.M. 1947, 93-2713.

27-2-406. When action stayed by injunction or other order or statutory prohibition. When the commencement of an action is stayed by injunction or other order of the court or judge or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

History: En. Sec. 18, p. 469, Bannack Stat.; re-en. Sec. 16, p. 518, Cod. Stat. 1871; re-en. Sec. 52, p. 50, L. 1877; re-en. Sec. 52, 1st Div. Rev. Stat. 1879; re-en. Sec. 52, 1st Div. Comp. Stat. 1887; amd. Sec. 548, C. Civ. Proc. 1895; re-en. Sec. 6465, Rev. C. 1907; re-en. Sec. 9055, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 356; re-en. Sec. 9055, R.C.M. 1935; R.C.M. 1947, 93-2709.

27-2-407. When action terminated or judgment reversed. If an action is commenced within the time limited therefor and a judgment therein is reversed on appeal without awarding a new trial or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff or, if he dies and the cause of action survives, his representative may commence a new action for the same cause after the expiration of the time so limited and within 1 year after such a reversal or termination.

History: En. Sec. 17, p. 469, Bannack Stat.; re-en. Sec. 15, p. 518, Cod. Stat. 1871; re-en. Sec. 51, p. 50, L. 1877; re-en. Sec. 51, 1st Div. Rev. Stat. 1879; re-en. Sec. 51, 1st Div. Comp. Stat. 1887; amd. Sec. 547, C. Civ. Proc. 1895; re-en. Sec. 6464, Rev. C. 1907; re-en. Sec. 9054, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 355; re-en. Sec. 9054, R.C.M. 1935; R.C.M. 1947, 93-2708.

27-2-408. Effect on counterclaim of termination of action. Where a defendant in an action has interposed an answer in support of which he would be entitled to rely at the trial upon a defense or counterclaim then existing in his favor, the remedy upon which, at the time of the commencement of the action, was not barred by the provisions of [93-2401 to 93-2720] and the complaint is dismissed or the action is discontinued or abates in consequence of the plaintiff's death, the time which intervened between the commencement and the termination of the action is not a part of the time limited for the commencement of an action by the defendant to recover for the cause of action so interposed as a defense or to interpose the same defense in another action brought by the same plaintiff or a person deriving title from or under him.

History: En. Sec. 553, C. Civ. Proc. 1895; re-en. Sec. 6470, Rev. C. 1907; re-en. Sec. 9060, R.C.M. 1921; re-en. Sec. 9060, R.C.M. 1935; R.C.M. 1947, 93-2714.

27-2-409. Acknowledgment of debt or part payment. No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of [93-2401 to 93-2720] unless the same is contained in some writing signed by the party to be charged thereby. But this section does not alter the effect of any payment of principal or interest, which payment is equivalent to a new promise in writing, duly signed, to pay the residue of the debt.

History: En. Sec. 21, p. 469, Bannack Stat.; re-en. Sec. 19, p. 518, Cod. Stat. 1871; re-en. Sec. 53, p. 50, L. 1877; re-en. Sec. 53, 1st Div. Rev. Stat. 1879; re-en. Sec. 53, 1st Div. Comp. Stat. 1887; amd. Sec. 555, C. Civ. Proc. 1895; re-en. Sec.

6472, Rev. C. 1907; re-en. Sec. 9062, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 360; re-en. Sec. 9062, R.C.M. 1935; R.C.M. 1947, 93-2716.

CHAPTERS 3 AND 4

RESERVED

CHAPTER 5

ARBITRATION

Part 1 — Submission to Arbitration, Revocation

Section
27-5-101. Kinds of controversies that may be submitted to arbitration.
27-5-102. Form of submission to arbitration.
27-5-103. Entry of submission as court order.
27-5-104. Effect of entry — revocation.
27-5-105. What may be recovered in action for revocation.

Part 2 — Action by Arbitrators

27-5-201. Oath of arbitrators.
27-5-202. Powers and duties of arbitrators.
27-5-203. Form of award — filing and delivery.

Part 3 — Procedure Following Award

27-5-301. When court may vacate award.
27-5-302. When court may modify or correct award.
27-5-303. When award has effect of a judgment.
27-5-304. Right to appeal.

Part 1

Submission to Arbitration, Revocation

27-5-101. Kinds of controversies that may be submitted to arbitration. Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property.

History: En. Sec. 302, p. 106, Bannack Stat.; re-en. Sec. 358, p. 207, L. 1867; re-en. Sec. 432, p. 122, Cod. Stat. 1871; re-en. Sec. 459, p. 163, L. 1877; re-en. Sec. 459, 1st Div. Rev. Stat. 1879; re-en. Sec. 472, 1st Div. Comp. Stat. 1887; re-en. Sec. 2270, C. Civ. Proc. 1895; re-en. Sec. 7365, Rev. C. 1907; re-en. Sec. 9972, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1281; re-en. Sec. 9972, R.C.M. 1935; R.C.M. 1947, 93-201-1.

27-5-102. Form of submission to arbitration. The submission to arbitration must be in writing and may be to one or more persons.

History: En. Sec. 303, p. 106, Bannack Stat.; re-en. Sec. 359, p. 207, L. 1867; re-en. Sec. 433, p. 122, Cod. Stat. 1871; re-en. Sec. 460, p. 163, L. 1877; re-en.

Sec. 460, 1st Div. Rev. Stat. 1879; re-en. Sec. 473, 1st Div. Comp. Stat. 1887; re-en. Sec. 2271, C. Civ. Proc. 1895; re-en. Sec. 7366, Rev. C. 1907; re-en. Sec. 9973, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1282; re-en. Sec. 9973, R.C.M. 1935; R.C.M. 1947, 93-201-2.

27-5-103. Entry of submission as court order. It may be stipulated in the submission that it be entered as an order of the district court, for which purpose it must be filed with the clerk of the district court of the county where the parties or one of them resides. The clerk must thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within which the award must be made.

History: En. Sec. 304, p. 107, Bannack Stat.; re-en. Sec. 360, p. 207, L. 1867; re-en. Sec. 434, p. 122, Cod. Stat. 1871; re-en. Sec. 461, p. 163, L. 1877; re-en. Sec. 461, 1st Div. Rev. Stat. 1879; re-en. Sec. 474, 1st Div. Comp. Stat. 1887; re-en. Sec. 2272, C. Civ. Proc. 1895; re-en. Sec. 7367, Rev. C. 1907; re-en. Sec. 9974, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1283; re-en. Sec. 9974, R.C.M. 1935; R.C.M. 1947, 93-201-3(part).

27-5-104. Effect of entry — revocation. When so entered, the submission cannot be revoked without the consent of both parties. The arbitrators may be compelled by the court or judge to make an award, and the award may be enforced by the court or judge in the same manner as a judgment. If the submission be not made an order of the court, it may be revoked at any time before the award is made.

History: En. Sec. 304, p. 107, Bannack Stat.; re-en. Sec. 360, p. 207, L. 1867; re-en. Sec. 434, p. 122, Cod. Stat. 1871; re-en. Sec. 461, p. 163, L. 1877; re-en. Sec. 461, 1st Div. Rev. Stat. 1879; re-en. Sec. 474, 1st Div. Comp. Stat. 1887; re-en. Sec. 2272, C. Civ. Proc. 1895; re-en. Sec. 7367, Rev. C. 1907; re-en. Sec. 9974, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1283; re-en. Sec. 9974, R.C.M. 1935; R.C.M. 1947, 93-201-3(part).

27-5-105. What may be recovered in action for revocation. If a submission to arbitration be revoked and an action be brought therefor, the amount to be recovered can only be the costs and damages sustained in preparing for and attending the arbitration.

History: En. Sec. 311, p. 109, Bannack Stat.; re-en. Sec. 367, p. 209, L. 1867; re-en. Sec. 441, p. 123, Cod. Stat. 1871; re-en. Sec. 468, p. 165, L. 1877; re-en. Sec. 468, 1st Div. Rev. Stat. 1879; re-en. Sec. 481, 1st Div. Comp. Stat. 1887; re-en. Sec. 2279, C. Civ. Proc. 1895; re-en. Sec. 7374, Rev. C. 1907; re-en. Sec. 9981, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1290; re-en. Sec. 9981, R.C.M. 1935; R.C.M. 1947, 93-201-10.

Part 2

Action by Arbitrators

27-5-201. Oath of arbitrators. Before acting, the arbitrators must be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy and to make a just award according to their understanding.

History: En. Sec. 306, p. 107, Bannack Stat.; re-en. Sec. 362, p. 208, L. 1867; re-en. Sec. 436, p. 122, Cod. Stat. 1871; re-en. Sec. 463, p. 164, L. 1877; re-en. Sec. 463, 1st Div. Rev. Stat. 1879; re-en. Sec. 476, 1st Div. Comp. Stat. 1887; re-en. Sec. 2274, C. Civ. Proc. 1895; re-en. Sec. 7369, Rev. C. 1907; re-en. Sec.

9976, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1285; re-en. Sec. 9976, R.C.M. 1935; R.C.M. 1947, 93-201-5(part).

27-5-202. Powers and duties of arbitrators. Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon. All the arbitrators must meet and act together during the investigation, but when met, a majority may determine any question.

History: Ap. p. Sec. 305, p. 107, Bannack Stat.; re-en. Sec. 361, p. 208, L. 1867; re-en. Sec. 435, p. 122, Cod. Stat. 1871; re-en. Sec. 462, p. 164, L. 1877; re-en. Sec. 462, 1st Div. Rev. Stat. 1879; re-en. Sec. 475, 1st Div. Comp. Stat. 1887; re-en. Sec. 2273, C. Civ. Proc. 1895; re-en. Sec. 7368, Rev. C. 1907; re-en. Sec. 9975, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1284; re-en. Sec. 9975, R.C.M. 1935; Sec. 93-201-4, R.C.M. 1947; Ap. p. Sec. 306, p. 107, Bannack Stat.; re-en. Sec. 362, p. 208, L. 1867; re-en. Sec. 436, p. 122, Cod. Stat. 1871; re-en. Sec. 463, p. 164, L. 1877; re-en. Sec. 463, 1st Div. Rev. Stat. 1879; re-en. Sec. 476, 1st Div. Comp. Stat. 1887; re-en. Sec. 2274, C. Civ. Proc. 1895; re-en. Sec. 7369, Rev. C. 1907; re-en. Sec. 9976, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1285; re-en. Sec. 9976, R.C.M. 1935; Sec. 93-201-5, R.C.M. 1947; R.C.M. 1947, 93-201-4, 93-201-5(part).

27-5-203. Form of award — filing and delivery. The award must be in writing, signed by the arbitrators or a majority of them, and delivered to the parties. When the submission is made an order of the court, the award must be filed with the clerk and a note thereof made in his register.

History: En. Sec. 307, p. 108, Bannack Stat.; re-en. Sec. 363, p. 208, L. 1867; re-en. Sec. 437, p. 123, Cod. Stat. 1871; re-en. Sec. 464, p. 164, L. 1877; re-en. Sec. 464, 1st Div. Rev. Stat. 1879; re-en. Sec. 477, 1st Div. Comp. Stat. 1887; re-en. Sec. 2275, C. Civ. Proc. 1895; re-en. Sec. 7370, Rev. C. 1907; re-en. Sec. 9977, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1286; re-en. Sec. 9977, R.C.M. 1935; R.C.M. 1947, 93-201-6(part).

Part 3

Procedure Following Award

27-5-301. When court may vacate award. The court or judge, on motion, may vacate the award upon any of the following grounds and may order a new hearing before the same arbitrators or not, in its or his discretion:

(1) It was procured by corruption or fraud.

(2) The arbitrators were guilty of misconduct or committed gross error in refusing, on cause shown, to postpone the hearing or in refusing to hear pertinent evidence or otherwise acted improperly in a manner by which the rights of the party were prejudiced.

(3) The arbitrators exceeded their powers in making the award, or they refused or improperly omitted to consider a part of the matters submitted to them.

(4) The award is indefinite or cannot be performed.

History: En. Sec. 308, p. 108, Bannack Stat.; re-en. Sec. 364, p. 208, L. 1867; re-en. Sec. 438, p. 123, Cod. Stat. 1871; re-en. Sec. 465, p. 165, L. 1877; re-en. Sec. 465, 1st Div. Rev. Stat. 1879; re-en. Sec. 478, 1st Div. Comp. Stat. 1887; re-en. Sec. 2276, C. Civ. Proc. 1895; re-en. Sec. 7371, Rev. C. 1907; re-en. Sec. 9978, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1287; re-en. Sec. 9978, R.C.M. 1935; R.C.M. 1947, 93-201-7.

27-5-302. When court may modify or correct award. The court or judge may, on motion, modify or correct the award where it appears that:

(1) there was a miscalculation in figures upon which it was made or that there is a mistake in the description of some persons or property therein;

(2) a part of the award is upon matters not submitted, which part can be separated from other parts and does not affect the decision on the matters submitted;

(3) the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

History: En. Sec. 309, p. 108, Bannack Stat.; re-en. Sec. 365, p. 209, L. 1867; re-en. Sec. 439, p. 123, Cod. Stat. 1871; re-en. Sec. 466, p. 165, L. 1877; re-en. Sec. 466, 1st Div. Rev. Stat. 1879; re-en. Sec. 479, 1st Div. Comp. Stat. 1887; re-en. Sec. 2277, C. Civ. Proc. 1895; re-en. Sec. 7372, Rev. C. 1907; re-en. Sec. 9979, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1288; re-en. Sec. 9979, R.C.M. 1935; R.C.M. 1947, 93-201-8.

27-5-303. When award has effect of a judgment. After the expiration of 5 days from the filing of the award, upon the application of a party, and on filing an affidavit showing that notice of filing the award has been served on the adverse party or his attorney at least 4 days prior to such application and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment book and thereupon has the effect of a judgment.

History: En. Sec. 307, p. 108, Bannack Stat.; re-en. Sec. 363, p. 208, L. 1867; re-en. Sec. 437, p. 123, Cod. Stat. 1871; re-en. Sec. 464, p. 164, L. 1877; re-en. Sec. 464, 1st Div. Rev. Stat. 1879; re-en. Sec. 477, 1st Div. Comp. Stat. 1887; re-en. Sec. 2275, C. Civ. Proc. 1895; re-en. Sec. 7370, Rev. C. 1907; re-en. Sec. 9977, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1286; re-en. Sec. 9977, R.C.M. 1935; R.C.M. 1947, 93-201-6(part).

27-5-304. Right to appeal. The decision upon the motion provided for in 27-5-301 or 27-5-302 is subject to appeal in the same manner as an order which is subject to appeal in a civil action, but the judgment entered before motion made cannot be subject to appeal.

History: En. Sec. 310, p. 109, Bannack Stat.; re-en. Sec. 366, p. 209, L. 1867; re-en. Sec. 440, p. 123, Cod. Stat. 1871; re-en. Sec. 467, p. 165, L. 1877; re-en. Sec. 467, 1st Div. Rev. Stat. 1879; re-en. Sec. 480, 1st Div. Comp. Stat. 1887; re-en. Sec. 2278, C. Civ. Proc. 1895; re-en. Sec. 7373, Rev. C. 1907; re-en. Sec. 9980, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1289; re-en. Sec. 9980, R.C.M. 1935; R.C.M. 1947, 93-201-9.

CHAPTER 6

MONTANA MEDICAL MALPRACTICE PANEL ACT

Part 1 — General Provisions

Section
27-6-101. Short title.
27-6-102. Purpose.
27-6-103. Definitions.
27-6-104. Creation of panel.
27-6-105. What claims panel to review.
27-6-106. Immunity of panel members and witnesses from civil liability.

Part 2 — Administration of Act

27-6-201. Appointment, term, and salary of director.

27-6-202. Employment of staff and maintenance of offices.
27-6-203. Compensation of panel and staff.
27-6-204. Authority to adopt rules.
27-6-205. Powers of panel.
27-6-206. Funding.

Part 3 — Preliminary Procedure

27-6-301. How cases submitted.
27-6-302. Contents of application — waiver of confidentiality of medical records.
27-6-303. Amendments to application.
27-6-304. Copies of application to professional societies when vicarious liability claimed.
27-6-305. Service on health care provider.
27-6-306. Health care provider's appearance and answer — waiver of confidentiality of records.
27-6-307. Assistance to defendant in obtaining expert consultation.
27-6-308. Director to furnish panel members with documents.

Part 4 — Formation and Composition of Panel

27-6-401. Composition of panel.
27-6-402. Selection of panelists.
27-6-403. Panel in cases involving multiple defendants.
27-6-404. Disqualification of panel member.

Part 5 — Hearing Procedure

27-6-501. Time and place of hearing.
27-6-502. Conduct of hearing.
27-6-503. Conclusion of hearing — supplemental hearing.

Part 6 — Deliberations and Decision of Panel

27-6-601. Selection of chairman.
27-6-602. Questions panel must decide.
27-6-603. Deliberations to be secret — voting.
27-6-604. Form and content of decision.
27-6-605. Decision to be filed and copies sent to parties, attorneys, and licensing board.
27-6-606. Decision not binding — settlement agreements.

Part 7 — Effect of Proceedings in Court Action—Confidentiality

27-6-701. No court action before application to and decision by panel.
27-6-702. Tolling of statute of limitations.
27-6-703. Records of proceedings — confidentiality.
27-6-704. Panel proceedings and report privileged from disclosure in court actions.

Part 1

General Provisions

27-6-101. Short title. This chapter may be cited as the "Montana Medical Malpractice Panel Act".

History: En. 17-1301 by Sec. 1, Ch. 449, L.1977; R.C.M. 1947, 17-1301.

27-6-102. Purpose. The purpose of this chapter is to prevent where possible the filing in court of actions against health care providers and their employees for professional liability in situations where the facts do not permit at least a reasonable inference of malpractice and to make possible the fair and equitable disposition of such claims against health care providers as are or reasonably may be well founded.

History: En. 17-1302 by Sec. 2, Ch. 449, L. 1977; R.C.M. 1947, 17-1302.

27-6-103. Definitions. As used in this chapter, the following definitions apply:

(1) "Health care provider" means a physician licensed to practice medicine in Montana or a hospital, hospital-related facility, or long-term care facility.

(2) "Malpractice claim" means any claim or potential claim against a health care provider for medical treatment, lack of medical treatment, or other alleged departure from accepted standards of health care which proximately results in damage to the patient, whether the patient's claim or potential claim sounds in tort or contract, and includes but is not limited to allegations of battery or wrongful death.

(3) "Panel" means the Montana medical malpractice panel provided for in 27-6-104.

History: En. 17-1303 by Sec. 3, Ch. 449, L. 1977; R.C.M. 1947, 17-1303.

27-6-104. Creation of panel. The Montana medical malpractice panel is created. The panel is attached to the Montana supreme court for administrative purposes only, except that 2-15-121(2) does not apply.

History: En. 17-1304 by Sec. 4, Ch. 449, L. 1977; R.C.M. 1947, 17-1304(part).

27-6-105. What claims panel to review. The panel shall review all malpractice claims or potential claims against health care providers covered by this chapter except those claims subject to a valid arbitration agreement allowed by law or upon which suit has been filed prior to April 19, 1977.

History: En. 17-1304 by Sec. 4, Ch. 449, L. 1977; R.C.M. 1947, 17-1304(part).

27-6-106. Immunity of panel members and witnesses from civil liability. Panelists and witnesses are absolutely immune from civil liability for all communications, findings, opinions, and conclusions made in the course and scope of the duties prescribed by this chapter.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(5).

Part 2

Administration of Act

27-6-201. Appointment, term, and salary of director. The director of the panel shall be appointed by the executive director of the Montana medical association, subject to the approval of the chief justice of the Montana supreme court. The director shall serve at the pleasure of, and the director's salary shall be set by, the executive director of the Montana medical association, subject to the approval of the chief justice.

History: En. 17-1304 by Sec. 4, Ch. 449, L. 1977; R.C.M. 1947, 17-1304(4).

27-6-202. Employment of staff and maintenance of offices. (1) The director, subject to the approval of the chief justice, may employ and fix the compensation for clerical and other assistants as he considers necessary.

(2) The panel shall maintain adequate offices, in which its records shall be kept and its official business transacted.

History: En. 17-1305 by Sec. 5, Ch. 449, L. 1977; R.C.M. 1947, 17-1305(4), (5).

27-6-203. Compensation of panel and staff. (1) All members of the panel shall be paid a salary in the amount of $40 an hour, under guidelines promulgated by the Montana supreme court.

(2) All members of the panel, the director, and his staff are entitled to travel expenses incurred while on the business of the panel, as provided in 2-18-501 through 2-18-503, but such expenses shall be approved by the director before payment is made.

History: En. 17-1305 by Sec. 5, Ch. 449, L. 1977; R.C.M. 1947, 17-1305(1), (2).

27-6-204. Authority to adopt rules. The director, in consultation with the state bar of Montana and subject to approval of the supreme court, is authorized to adopt and publish rules of procedure necessary to implement and carry out the duties of the medical review panel. No rules may be adopted, however, which require a party to make a monetary payment as a condition to bringing a malpractice claim before the medical review panel.

History: En. 17-1313 by Sec. 13, Ch. 449, L. 1977; R.C.M. 1947, 17-1313.

27-6-205. Powers of panel. The panel may provide for the administration of oaths, the receipt of claims filed, the promulgation of forms required by this chapter, the issuance of subpoenas in connection with the administration of this chapter, and the performance of all other acts required to fairly and effectively administer this chapter.

History: En. 17-1305 by Sec. 5, Ch. 449, L. 1977; R.C.M. 1947, 17-1305(3).

27-6-206. Funding. (1) There is created a pretrial review fund to be administered by the director exclusively for the purposes stated in this chapter. The fund and any income from it shall be held in trust, deposited in an account, and invested and reinvested by the director with the prior approval of the director of the Montana medical association. The fund may not become a part of or revert to the general fund of this state but shall be open to auditing by the legislative auditor.

(2) To create the fund, an annual surcharge shall be levied on all health care providers. The amount of the assessment shall be set by the director, who shall allocate a projected cost among health care providers on a per capita basis. The director may provide a different allocation upon approval by the supreme court. Surplus funds, if any, over and above the amount required for the annual administration of the chapter shall be retained by the director and used to finance the administration of this chapter in succeeding years, in which event the director shall reduce the annual assessment in subsequent years, commensurate with the proper administration of this chapter.

(3) The annual surcharge shall be paid on or before the date physicians' annual registration fees are due under 37-3-313. The director has the same powers and duties in connection with the collection of and failure to pay the annual surcharge as the department of professional and occupational licensing has under 37-3-313 in connection with physicians' annual registration fees.

History: En. 17-1306 by Sec. 6, Ch. 449, L. 1977; R.C.M. 1947, 17-1306(part).

Part 3

Preliminary Procedure

27-6-301. How cases submitted. Claimants shall submit a case for the consideration of the panel prior to filing a complaint in any district court or other court sitting in Montana by addressing an application, in writing, signed by the patient or his attorney, to the director of the panel.

History: En. 17-1304 by Sec. 4, Ch. 449, L. 1977; R.C.M. 1947, 17-1304(3).

27-6-302. Contents of application — waiver of confidentiality of medical records. The application shall contain the following:

(1) a statement in reasonable detail of the elements of the health care provider's conduct which are believed to constitute a malpractice claim, the dates the conduct occurred, and the names and addresses of all physicians and hospitals having contact with the claimant and all witnesses;

(2) a statement authorizing the panel to obtain access to all medical and hospital records and information pertaining to the claim and, for the purposes of its consideration of this matter only, waiving any privilege as to the contents of those records. Nothing in that statement may in any way be construed as waiving that privilege for any other purpose or in any other context, in or out of court.

History: En. 17-1307 by Sec. 7, Ch. 449, L. 1977; R.C.M. 1947, 17-1307(part).

27-6-303. Amendments to application. Any amendments to the applicaton must be filed not less than 14 days prior to the hearing date.

History: En. 17-1307 by Sec. 7, Ch. 449, L. 1977; R.C.M. 1947, 17-1307(part).

27-6-304. Copies of application to professional societies when vicarious liability claimed. In instances where applications are received employing a theory of respondeat superior or some other derivative theory of recovery, the director shall forward the application to the state professional societies, associations, or licensing boards of both the individual health care provider whose alleged malpractice caused the application to be filed and the health care provider named a respondent as employer, master, or principal.

History: En. 17-1308 by Sec. 8, Ch. 449, L. 1977; R.C.M. 1947, 17-1308(3).

27-6-305. Service on health care provider. Upon receipt of an application for review, the director or his delegate shall cause to be served a true copy of the application on the health care providers involved. Service shall be effected pursuant to the Montana Rules of Civil Procedure.

History: En. 17-1308 by Sec. 8, Ch. 449, L. 1977; R.C.M. 1947, 17-1308(part).

27-6-306. Health care provider's appearance and answer — waiver of confidentiality of records. (1) If a health care provider involved chooses to retain legal counsel, his attorney shall informally enter his appearance with the director.

(2) The health care provider shall answer the application for review and shall submit a statement authorizing the panel to inspect all medical and hospital records and information pertaining to the application and, for the purposes of such inspection only, waiving any privilege as to the contents of those records. Nothing in the statement waives that privilege for any other purpose.

History: En. 17-1308 by Sec. 8, Ch. 449, L. 1977; R.C.M. 1947, 17-1308(part).

27-6-307. Assistance to defendant in obtaining expert consultation. The panel director shall cooperate fully with the claimant in retaining a physician qualified in the field of medicine involved, who will consult with the claimant upon payment of a reasonable fee by the claimant.

History: En. 17-1308 by Sec. 8, Ch. 449, L. 1977; R.C.M. 1947, 17-1308(4).

27-6-308. Director to furnish panel members with documents. At least 10 days prior to the hearing, the director shall furnish to each panel member copies of all claims, briefs, medical records, and other documents the director considers necessary.

History: En. 17-1311 by Sec. 11, Ch. 449, L. 1977; R.C.M. 1947, 17-1311(8).

Part 4

Formation and Composition of Panel

27-6-401. Composition of panel. (1) Those eligible to sit on the panel are health care providers licensed pursuant to Montana law and residing in Montana and the members of the state bar of Montana. Three panel members from the health care provider's profession and three panel members from the state bar shall sit in review of each case.

(2) In those cases where the theory of respondeat superior or some other derivative theory of recovery is employed, two of the panel members shall be chosen from the individual health care provider's profession and one panel member shall be chosen from the profession of the health care provider named a respondent as employer, master, or principal.

History: Ap. p. 17-1304 by Sec. 4, Ch. 449, L. 1977; Sec. 17-1304, R.C.M. 1947; Ap. p. 17-1309 by Sec. 9, Ch. 449, L. 1977; Sec. 17-1309, R.C.M. 1947; R.C.M. 1947, 17-1304(2), 17-1309(4), (5).

27-6-402. Selection of panelists. (1) Application for review shall be promptly transmitted by the director to the directors of the health care provider's state professional society or association and the state bar, which shall each select three panelists within 30 days from the date of transmittal of the application.

(2) If no state professional society or association exists or if the health care provider does not belong to such a society or association, the director shall transmit the application to the health care provider's state licensing board, which shall in turn select three persons from the health care provider's profession, and where applicable, to persons specializing in the same field or discipline as the health care provider.

History: En. 17-1309 by Sec. 9, Ch. 449, L. 1977; R.C.M. 1947, 17-1309(1), (2).

27-6-403. Panel in cases involving multiple defendants. Whenever there are multiple defendants, the case against each health care provider may be reviewed by a separate panel or, at the discretion of the panel initially appointed or by stipulation of the parties, a single combined panel may review all the claims against all parties defendant.

History: En. 17-1309 by Sec. 9, Ch. 449, L. 1977; R.C.M. 1947, 17-1309(3).

27-6-404. Disqualification of panel member. (1) Any member shall disqualify himself from consideration of any case in which, by virtue of his circumstances, he feels his presence on the panel would be inappropriate, considering the purpose of the panel. The director may excuse a proposed panelist from serving.

(2) Whenever a party makes and files an affidavit that a panel member selected pursuant to this part cannot, according to the belief of the party making the affidavit, sit in review of the application with impartiality, that panel member may proceed no further. Another panel member must be selected by the health care provider's professional association, state licensing board, or the state bar, as the case may be. A party may not disqualify more than three panel members in this manner in any single malpractice claim, and the affidavit must be filed at least 20 days prior to the date of hearing.

History: En. 17-1309 by Sec. 9, Ch. 449, L. 1977; R.C.M. 1947, 17-1309(6), (7).

Part 5

Hearing Procedure

27-6-501. Time and place of hearing. (1) A date, time, and place for hearing shall be fixed by the director subject to subsection(2), and prompt notice thereof shall be given to the parties involved, the attorneys, and the members of the panel. In no instance may the date set be more than 120 days after the transmittal by the director of the application for review unless the panel finds good cause exists for extending the period.

(2) Panel hearings may be held in any county the panel considers necessary or advisable. The county commissioners or other governing authority shall provide, upon request of the director of the panel, suitable facilities for any such hearing.

History: (1)En. 17-1310 by Sec. 10, Ch. 449, L. 1977; Sec. 17-1310, R.C.M. 1947; (2)En. 17-1305 by Sec. 5, Ch. 449, L. 1977; Sec. 17-1305, R.C.M. 1947; R.C.M. 1947, 17-1305(6), 17-1310.

27-6-502. Conduct of hearing. (1) At the time set for hearing, the claimant submitting the case for review shall be present and shall make a brief introduction of his case, including a resume of the facts constituting the alleged professional malpractice which he is prepared to prove. The health care provider against whom the claim is brought and his attorney may be present and may make an introductory statement of his case.

(2) Both parties may call witnesses to testify before the panel, which witnesses shall be sworn. Medical texts, journals, studies, and other documentary evidence relied upon by either party may be offered and admitted if relevant. Written statements of facts by treating health care providers may be reviewed.

(3) The hearing will be informal, and no official transcript may be made.

History: En. 17-1311 by Sec. 11, Ch. 449, L. 1977; R.C.M. 1947, 17-1311(1) thru (3).

27-6-503. Conclusion of hearing — supplemental hearing. (1) At the conclusion of the hearing, the panel may take the case under advisement or may request that additional facts, records, witnesses, or other information be obtained and presented to it at a supplemental hearing, which shall be set for a date and time certain, not longer than 30 days from the date of the original hearing unless the attorney bringing the matter for review consents in writing to a longer period.

(2) Any supplemental hearing shall be held in the same manner as the original hearing, and the parties concerned and their attorneys may be present.

History: En. 17-1311 by Sec. 11, Ch. 449, L. 1977; R.C.M. 1947, 17-1311(4), (5).

Part 6

Deliberations and Decision of Panel

27-6-601. Selection of chairman. At or prior to the time set for the hearing, the attorney members of the panel shall select a chairman who shall be an attorney and who shall preside over the panel deliberations.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(part).

27-6-602. Questions panel must decide. Upon consideration of all the relevant material, the panel shall decide whether there is:

(1) substantial evidence that the acts complained of occurred and that they constitute malpractice; and

(2) a reasonable medical probability that the patient was injured thereby.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(part).

27-6-603. Deliberations to be secret — voting. The deliberations of the panel are confidential. All votes of the panel on the questions for discussion shall be by secret ballot. The decision shall be by a majority vote of those voting members of the panel who sat on the entire case.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(part).

27-6-604. Form and content of decision. The decision shall in every case be signed for the panel by the chairman and shall contain only the conclusions reached by a majority of its members and shall list the number of members, if any, dissenting therefrom. The majority may briefly explain the reasoning and the basis for their decision, and the dissenters may likewise explain the reason for disagreement.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(3).

27-6-605. Decision to be filed and copies sent to parties, attorneys, and licensing board. The decision shall be communicated in writing to the parties and attorneys concerned, and a copy thereof shall be retained in the permanent files of the panel. The copy of the report shall be sent to the health care provider's professional licensing board.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(part).

27-6-606. Decision not binding — settlement agreements. The panel's decision is without administrative or judicial authority and is not binding upon any party. The panel may recommend an award, approve settlement agreements, and discuss the same, all in a manner not inconsistent with this part, and all such approved settlement agreements are binding on the parties.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(6).

Part 7

Effect of Proceedings in Court Action — Confidentiality

27-6-701. No court action before application to and decision by panel. No malpractice claim may be filed in any court against a health care provider before an application is made to the panel and its decision is rendered.

History: En. 17-1307 by Sec. 7, Ch. 449, L. 1977; R.C.M. 1947, 17-1307(1).

27-6-702. Tolling of statute of limitations. The running of the applicable limitation period in a malpractice claim is tolled upon receipt by the director of the application for review and does not begin again until 30 days after the panel's final decision is entered in the permanent files of the panel and a copy is served upon the complainant and his attorney by certified mail.

History: En. 17-1314 by Sec. 14, Ch. 449, L. 1977; R.C.M. 1947, 17-1314.

27-6-703. Records of proceedings — confidentiality. The director shall maintain records of all proceedings before the panel, which must include the nature of the act or omissions complained of, a brief summary of the evidence expressed, the decision of the panel, and any majority or dissenting opinions filed. Any records which may identify any party to the proceedings may not be made public and are not subject to subpoena but are to be used solely for the purpose of compiling statistical data and facilitating ongoing studies of medical malpractice in Montana.

History: En. 17-1315 by Sec. 15, Ch. 449, L. 1977; R.C.M. 1947, 17-1315.

27-6-704. Panel proceedings and report privileged from disclosure in court actions. (1) No panel member may be called to testify in any proceeding concerning the deliberations, discussions, decisions, and internal proceedings of the panel.

(2) No statement made by any person during a hearing before the panel may be used as impeaching evidence in court. The report of the medical review panel is not admissible as evidence in any action subsequently brought in any court of law.

History: Ap. p. 17-1311 by Sec. 11, Ch. 449, L. 1977; Sec. 17-1311, R.C.M. 1947; Ap. p. 17-1312 by Sec. 12, Ch. 449, L. 1977; Sec. 17-1312, R.C.M. 1947; R.C.M. 1947, 17-1311(6), (7), 17-1312(part).

CHAPTER 7

SUBMISSION OF CONTROVERSY WITHOUT ACTION

Part 1 — General Provisions

Section
27-7-101. When and in what court controversy may be submitted.
27-7-102. Action by court.
27-7-103. Entry of judgment — costs.
27-7-104. Enforcement of judgment — appeal.

Part 1

General Provisions

27-7-101. When and in what court controversy may be submitted. Parties to a question in difference which might be subject to a civil action may, without action, agree upon a case containing the facts upon which the controversy depends and present a submission of the same to any court which would have jurisdiction if an action had been brought, but it must appear by affidavit that the controversy is real and the proceedings in good faith to determine the rights of the parties.

History: En. Sec. 299, p. 106, Bannack Stat.; re-en. Sec. 355, p. 207, L. 1867; re-en. Sec. 429, p. 121, Cod. Stat. 1871; re-en. Sec. 455, p. 162, L. 1877; re-en. Sec. 455, 1st Div. Rev. Stat. 1879; re-en. Sec. 468, 1st Div. Comp. Stat. 1887; re-en. Sec. 2050, C. Civ. Proc. 1895; re-en. Sec. 7254, Rev. c. 1907; re-en. Sec. 9872, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1138; re-en. Sec. 9872, R.C.M. 1935; R.C.M. 1947, 93-9501(part).

27-7-102. Action by court. The court must thereupon hear and determine the case and render judgment thereon as if an action were depending.

History: En. Sec. 299, p. 106, Bannack Stat.; re-en. Sec. 355, p. 207, L. 1867; re-en. Sec. 429, p. 121, Cod. Stat. 1871; re-en. Sec. 455, p. 162, L. 1877; re-en. Sec. 455, 1st Div. Rev. Stat. 1879; re-en. Sec. 468, 1st Div. Comp. Stat. 1887; re-en. Sec. 2050, C. Civ. Proc. 1895; re-en. Sec. 7254, Rev. c. 1907; re-en. Sec. 9872, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1138; re-en. Sec. 9872, R.C.M. 1935; R.C.M. 1947, 93-9501(part).

27-7-103. Entry of judgment — costs. Judgment must be entered in the judgment book as in other cases but without costs for any proceeding prior to the trial. The case, the submission, and a copy of the judgment constitute the judgment roll.

History: En. Sec. 300, p. 106, Bannack Stat.; re-en. Sec. 356, p. 207, L. 1867; re-en. Sec. 430, p. 121, Cod. Stat. 1871; re-en. Sec. 456, p. 163, L. 1877; re-en. Sec. 456, 1st Div. Rev. Stat. 1879; re-en. Sec. 469, 1st Div. Comp. Stat. 1887; re-en. Sec. 2051, C. Civ. Proc. 1895; re-en. Sec. 7255, Rev. C. 1907; re-en. Sec. 9873, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1139; re-en. Sec. 9873, R.C.M. 1935; R.C.M. 1947, 93-9502.

27-7-104. Enforcement of judgment — appeal. The judgment may be enforced in the same manner as if it had been rendered in an action and is in the same manner subject to appeal.

History: En. Sec. 301, p. 106, Bannack Stat.; re-en. Sec. 357, p. 207, L. 1867; re-en. Sec. 431, p. 121, Cod. Stat. 1871; re-en. Sec. 457, p. 163, L. 1877; re-en. Sec. 457, 1st Div. Rev. Stat. 1879; re-en.Sec. 470, 1st Div. Comp. Stat. 1887; re-en. Sec. 2052, C. Civ. Proc. 1895; re-en. Sec. 7256, Rev. C. 1907; re-en. Sec. 9874, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1140; re-en. Sec. 9874, R.C.M. 1935; R.C.M. 1947, 93-9503.

CHAPTER 8

UNIFORM DECLARATORY JUDGMENTS ACT

Part 1 — General Provisions

Section
27-8-101. Short title.
27-8-102. Purpose — liberal construction.
27-8-103. Uniformity of interpretation.
27-8-104. Definition of person.

Part 2 — Availability of Declaratory Judgments

27-8-201. Scope of power to render declaratory judgments.
27-8-202. Who may obtain declaratory judgment.

27-8-203. When contract may be construed.
27-8-204. Declarations concerning administration of trusts and estates.
27-8-205. Enumeration not restrictive of general powers.
27-8-206. Court's discretion to refuse to render judgment.

Part 3 — Procedure

27-8-301. Necessary parties.
27-8-302. Jury trial.
Sections 27-8-303 through 27-8-310 reserved.
27-8-311. Costs.
27-8-312. Review of orders and judgments.
27-8-313. Supplemental relief.

Part 1

General Provisions

27-8-101. Short title. This chapter may be cited as the "Uniform Declaratory Judgments Act".

History: En. Sec. 16, Ch. 16, L. 1935; re-en. Sec. 9835.16, R.C.M. 1935; R.C.M. 1947, 93-8916.

27-8-102. Purpose — liberal construction. This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.

History: En. Sec. 12, Ch. 16, L. 1935; re-en. Sec. 9835.12, R.C.M. 1935; R.C.M. 1947, 93-8912.

27-8-103. Uniformity of interpretation. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

History: En. Sec. 15, Ch. 16, L. 1935; re-en. Sec. 9835.15, R.C.M. 1935; R.C.M. 1947, 93-8915.

27-8-104. Definition of person. The word "person", wherever used in this chapter, shall be construed to mean any person, partnership, joint-stock company, unincorporated association, or society or municipal or other corporation of any character whatsoever.

History: En. Sec. 13, Ch. 16, L. 1935; re-en. Sec. 9835.13, R.C.M. 1935; R.C.M. 1947, 93-8913.

Part 2

Availability of Declaratory Judgments

27-8-201. Scope of power to render declaratory judgments. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.

No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

History: En. Sec. 1, Ch. 16, L. 1935; re-en. Sec. 9835.1, R.C.M. 1935; R.C.M. 1947, 93-8901.

27-8-202. Who may obtain declaratory judgment. Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

History: En. Sec. 2, Ch. 16, L. 1935; re-en. Sec. 9835.2, R.C.M. 1935; R.C.M. 1947, 93-8902.

27-8-203. When contract may be construed. A contract may be construed either before or after there has been a breach thereof.

History: En. Sec. 3, Ch. 16, L. 1935; re-en. Sec. 9835.3, R.C.M. 1935; R.C.M. 1947, 93-8903.

27-8-204. Declarations concerning administration of trusts and estates. Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or of the estate of a decedent, infant, lunatic, or insolvent may have a declaration of rights or legal relations in respect thereto:

(1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;

(2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(3) to determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

History: En. Sec. 4, Ch. 16, L. 1935; re-en. Sec. 9835.4, R.C.M. 1935; R.C.M. 1947, 93-8904.

27-8-205. Enumeration not restrictive of general powers. The enumeration in 27-8-202 through 27-8-204 does not limit or restrict the exercise of the general powers conferred in 27-8-201 in any proceeding where declaratory relief is sought in which a judgment or decree will terminate the controversy or remove an uncertainty.

History: En. Sec. 5, Ch. 16, L. 1935; re-en. Sec. 9835.5, R.C.M. 1935; R.C.M. 1947, 93-8905.

27-8-206. Court's discretion to refuse to render judgment. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

History: En. Sec. 6, Ch. 16, L. 1935; re-en. Sec. 9835.6, R.C.M. 1935; R.C.M. 1947, 93-8906.

Part 3

Procedure

27-8-301. Necessary parties. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

History: En. Sec. 11, Ch. 16, L. 1935; re-en. Sec. 9835.11, R.C.M. 1935; R.C.M. 1947, 93-8911.

27-8-302. Jury trial. When a proceeding under this chapter involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

History: En. Sec. 9, Ch. 16, L. 1935; re-en. Sec. 9835.9, R.C.M. 1935; R.C.M. 1947, 93-8909.

27-8-303 through 27-8-310 reserved.

27-8-311. Costs. In any proceeding under this chapter the court may make such award of costs as may seem equitable and just.

History: En. Sec. 10, Ch. 16, L. 1935; re-en. Sec. 9835.10, R.C.M. 1935; R.C.M. 1947, 93-8910.

27-8-312. Review of orders and judgments. All orders, judgments, and decrees under this chapter may be reviewed as other orders, judgments, and decrees.

History: En. Sec. 7, Ch. 16, L. 1935; re-en. Sec. 9835.7, R.C.M. 1935; R.C.M. 1947, 93-8907.

27-8-313. Supplemental relief. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by a declaratory judgment or decree to show cause why further relief should not be granted forthwith.

History: En. Sec. 8, Ch. 16, L. 1935; re-en. Sec. 9835.8, R.C.M. 1935; R.C.M. 1947, 93-8908.

CHAPTER 9

CONFESSION OF JUDGMENT

Part 1 — General Provisions

Section
27-9-101. When and in what courts judgment may be confessed.
27-9-102. Requirement of signed, verified statement by defendant.

27-9-103. Filing and costs — district court.
27-9-104. Filing and costs — justice's court.

Part 1

General Provisions

27-9-101. When and in what courts judgment may be confessed. A judgment by confession may be entered without action, either for money due or to become due or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. Such judgment may be entered in any court having jurisdiction for like amounts. Judgment upon confession may be entered up in any justice's court specified in the confession, as provided in this chapter.

History: Ap. p. Sec. 297, p. 105, Bannack Stat.; re-en. Sec. 352, p. 206, L. 1867; re-en. Sec. 426, p. 120, Cod. Stat. 1871; amd. Sec. 452, p. 162, L. 1877; re-en. Sec. 452, 1st Div. Rev. Stat. 1879; re-en. Sec. 465, 1st Div. Comp. Stat. 1887; re-en. Sec. 2040, C. Civ. Proc. 1895; re-en. Sec. 7250, Rev. C. 1907; re-en. Sec. 9868, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1132; re-en. Sec. 9868, R.C.M. 1935; Sec. 93-9401, R.C.M. 1947; Ap. p. Sec. 1620, C. Civ. Proc. 1895; re-en. Sec. 7046, Rev. C. 1907; re-en. Sec. 9679, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 889; re-en. Sec. 9679, R.C.M. 1935; Sec. 93-7301, R.C.M. 1935; R.C.M. 1947, 93-7301, 93-9401.

27-9-102. Requirement of signed, verified statement by defendant. A statement in writing must be made, signed by the defendant, and verified by his oath to the following effect:

(1) It must authorize the entry of judgment for a specified sum.

(2) If it be for money due or to become due, it must state concisely the facts out of which it arose and show that the sum confessed therefor is justly due or to become due.

(3) If it be for the purpose of securing the plaintiff against contingent liability, it must state concisely the facts constituting the liability and show that the sum confessed therefor does not exceed the same.

History: En. Sec. 298, p. 105, Bannack Stat.; amd. Sec. 353, p. 206, L. 1867; re-en. Sec. 427, p. 120, Cod. Stat. 1871; re-en. Sec. 453, p. 162, L. 1877; re-en. Sec. 453, 1st Div. Rev. Stat. 1879; re-en. Sec. 466, 1st Div. Comp. Stat. 1887; re-en. Sec. 2041, C. Civ. Proc. 1895; re-en. Sec. 7251, Rev. C. 1907; re-en. Sec. 9869, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1133; re-en. Sec. 9869, R.C.M. 1935; R.C.M. 1947, 93-9402.

27-9-103. Filing and costs — district court. The statement must be filed with the clerk of the court in which the judgment is to be entered, who must endorse upon it and enter in the judgment book a judgment of such court for the amount confessed, with $10 costs. The statement and affidavit, with the judgment endorsed thereon, becomes the judgment roll.

History: En. Sec. 354, p. 206, L. 1867; re-en. Sec. 428, p. 120, Cod. Stat. 1871; re-en. Sec. 454, p. 162, L. 1877; re-en. Sec. 454, 1st Div. Rev. Stat. 1879; re-en. Sec. 467, 1st Div. Comp. Stat. 1887; amd. Sec. 2042, C. Civ. Proc. 1895; re-en. Sec. 7252, Rev. C. 1907; re-en. Sec. 9870, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1134; re-en. Sec. 9870, R.C.M. 1935; R.C.M. 1947, 93-9403.

27-9-104. Filing and costs — justice's court. In a justice's court where the court has authority to enter the judgment, the statement may be filed with the justice, who may thereupon enter in his docket a judgment of his court for the amount confessed, with $5 costs in the district court and $3 in the justice's court. If a transcript of such judgment be filed with the clerk, a copy of the statement must be filed with it.

History: En. Sec. 2043, C. Civ. Proc. 1895; re-en. Sec. 7253, Rev. C. 1907; re-en. Sec. 9871, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1135; re-en. Sec. 9871, R.C.M. 1935; R.C.M. 1947, 93-9404.

CHAPTERS 10 THROUGH 14

RESERVED

CHAPTER 15

PROVISIONAL REMEDIES

Part 1 — General Provisions

Section

27-15-101. When plaintiff may be required to elect among arrest, injunction, and attachment.
27-15-102. Availability of provisional remedies to defendant interposing counterclaim.
27-15-103. Time limit on decisions regarding arrest, injunction, or attachment.

Part 1

General Provisions

27-15-101. When plaintiff may be required to elect among arrest, injunction, and attachment. Where an application for an order of arrest, injunction order, and writ of attachment or two of them is made in the same action against the same defendant and it satisfactorily appears that, under the particular circumstances of the case, two or all of them are not necessary for the plaintiff's security, the court or judge may, in its or his discretion, require the plaintiff to elect between them.

History: En. Sec. 980, C. Civ. Proc. 1895; re-en. Sec. 6708, Rev. C. 1907; re-en. Sec. 9311, R.C.M. 1921; re-en. Sec. 9311, R.C.M. 1935; R.C.M. 1947, 93-4601(part).

27-15-102. Availability of provisional remedies to defendant interposing counterclaim. Where the defendant interposes a counterclaim and thereupon demands an affirmative judgment against the plaintiff, his right to a provisional remedy is the same as in an action brought by him against the plaintiff for the cause of action stated in the counterclaim and demanding the same judgment; and for the purpose of applying to such a case the provisions of chapters 15 through 20 (except part 10 of chapter 16, 27-17-102, 27-17-401, 27-18-111, and part 15 of chapter 18) and Title 25, chapter 8, the defendant is deemed the plaintiff, the plaintiff is deemed the defendant, and the counterclaim so set forth in the answer is deemed the complaint.

History: En. Sec. 981, C. Civ. Proc. 1895; re-en. Sec. 6709, Rev. C. 1907; re-en. Sec. 9312, R.C.M. 1921; re-en. Sec. 9312, R.C.M. 1935; R.C.M. 1947, 93-4602.

27-15-103. Time limit on decisions regarding arrest, injunction, or attachment. Where an application is made to obtain, vacate, modify, or set aside an order of arrest, injunction order, or writ of attachment, the court or judge must finally decide the same within 20 days after it is submitted for decision.

History: En. Sec. 980, C. Civ. Proc. 1895; re-en. Sec. 6708, Rev. C. 1907; re-en. Sec. 9311, R.C.M. 1921; re-en. Sec. 9311, R.C.M. 1935; R.C.M. 1947, 93-4601(part).

CHAPTER 16

ARREST AND BAIL IN CIVIL ACTIONS

Part 1 — General Provisions

Section
27-16-101. Exclusive procedure for arrest in civil action.
27-16-102. When defendant may be arrested.

Part 2 — Order for Arrest—Execution

27-16-201. Order from judge required.
27-16-202. Time for making order.
27-16-203. When order must be made.
27-16-204. Plaintiff's undertaking.
27-16-205. Affidavits of sureties — filing of undertaking.
27-16-206. Directions to sheriff in order.
27-16-207. Service of order and affidavit.
27-16-208. Execution of order — prepayment of expense by plaintiff.
27-16-209. Liability of sheriff for escape or rescue.
27-16-210. Recovery on sheriff's official bond.

Part 3 — Vacation of Order—Reduction of Bail

27-16-301. Proceedings to vacate order or reduce bail.
27-16-302. When order vacated or bail reduced.

Part 4 — Giving Bail

27-16-401. Discharge of defendant upon giving bail before execution.
27-16-402. Form of undertaking for bail.
27-16-403. Qualifications of sureties.
27-16-404. Filing of order with return and undertaking — plaintiff's notice of nonacceptance.
27-16-405. Notice of justification of sureties — new undertaking.
27-16-406. Procedure for justification.
27-16-407. Acceptance of sufficiency of sureties by judge or clerk.

Part 5 — Liability and Exoneration of Sureties

27-16-501. Surrender of defendant.
27-16-502. Manner and time of surrender.
27-16-503. Exoneration of sureties.
27-16-504. Action to enforce sureties' liability.
27-16-505. Other circumstances in which sureties exonerated.

Part 6 — Deposit of Money in Lieu of Bail

27-16-601. Deposit of money by defendant with sheriff.
27-16-602. Sheriff to pay money into court — certificates of payment.
27-16-603. Substituting bail for deposit.

27-16-604. Disposition of deposited money after judgment.

Parts 7 through 9 reserved

Part 10 —Arrest in Civil Actions in Justice's Court

27-16-1001. Justice's authority to order arrest.
27-16-1002. Plaintiff's affidavit and undertaking.
27-16-1003. Defendant to be taken before justice immediately.
27-16-1004. Notice to plaintiff of arrest — officer's certificate.
27-16-1005. Officer to detain defendant — expenses.
27-16-1006. Defense against order of arrest.

Part 1

General Provisions

27-16-101. Exclusive procedure for arrest in civil action. No person shall be arrested in a civil action except as prescribed by this chapter.

History: En. Sec. 72, p. 148, L. 1867; re-en. Sec. 80, p. 44, Cod. Stat. 1871; re-en. Sec. 118, p. 68, L. 1877; re-en. Sec. 118, 1st Div. Rev. Stat. 1879; re-en. Sec. 120, 1st Div. Comp. Stat. 1887; re-en. Sec. 800, C. Civ. Proc. 1895; re-en. Sec. 6595, Rev. C. 1907; re-en. Sec. 9193, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 478; re-en. Sec. 9193, R.C.M. 1935; R.C.M. 1947, 93-4001.

27-16-102. When defendant may be arrested. The defendant may be arrested in the following cases:

(1) in an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state with intent to defraud his creditors;

(2) when the action is for willful injury to person, to character, or to property, knowing the property to belong to another;

(3) in an action for a fine or penalty or for money or property fraudulently misapplied or converted to his own use by a public officer, an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity; for misconduct or neglect in office or in a professional employment; or for a willful violation of duty;

(4) in an action to recover possession of personal property unjustly obtained, when the property or any part thereof has been concealed, removed, or disposed of so that it cannot be found or taken by the sheriff;

(5) when the defendant has been guilty of fraud in contracting the debt, in incurring the obligation for which the action is brought, or in concealing or disposing of the property or for taking, detention, or conversion of which the action is brought;

(6) when the defendant has removed or disposed of his property or is about to do so with intent to defraud his creditors.

History: En. Sec. 73, p. 148, L. 1867; re-en. Sec. 81, p. 44, Cod. Stat. 1871; re-en. Sec. 119, p. 68, L. 1877; re-en. Sec. 119, 1st Div. Rev. Stat. 1879; re-en. Sec. 121, 1st Div. Comp. Stat. 1887; re-en. Sec. 801, C. Civ. Proc. 1895; re-en. Sec. 6596, Rev. C. 1907; re-en. Sec. 9194, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 479; re-en. Sec. 9194, R.C.M. 1935; amd. Sec. 69, Ch. 359, L. 1977; R.C.M. 1947, 93-4002.

Part 2

Order for Arrest — Execution

27-16-201. Order from judge required. An order for the arrest of the defendant must be obtained from the judge of the court in which the action is brought.

History: En. Sec. 74, p. 148, L. 1867; re-en. Sec. 82, p. 44, Cod. Stat. 1871; re-en. Sec. 120, p. 68, L. 1877; re-en. Sec. 120, 1st Div. Rev. Stat. 1879; re-en. Sec. 122, 1st Div. Comp. Stat. 1887; re-en. Sec. 802, C. Civ. Proc. 1895; re-en. Sec. 6597, Rev. C. 1907; re-en. Sec. 9195, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 480; re-en. Sec. 9195, R.C.M. 1935; R.C.M. 1947, 93-4003.

27-16-202. Time for making order. The order may be made at the time of issuing the summons or at any time afterwards before judgment.

History: En. Sec. 77, p. 148, L. 1867; re-en. Sec. 85, p. 44, Cod. Stat. 1871; re-en. Sec. 123, p. 69, L. 1877; re-en. Sec. 123, 1st Div. Rev. Stat. 1879; re-en. Sec. 125, 1st Div. Comp. Stat. 1887; re-en. Sec. 805, C. Civ. Proc. 1895; re-en. Sec. 6600, Rev. C. 1907; re-en. Sec. 9198, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 483; re-en. Sec. 9198, R.C.M. 1935; R.C.M. 1947, 93-4006(part).

27-16-203. When order must be made. The order must be made whenever it shall appear to the judge, by the affidavit of the plaintiff or some other person, that a sufficient cause of action exists and that the case is one of those mentioned in 27-16-102.

History: En. Secs. 75, 76, p. 148, L. 1867; re-en. Sec. 83, p. 44, Cod. Stat. 1871; re-en. Sec. 121, p. 69, L. 1877; re-en. Sec. 121, 1st Div. Rev. Stat. 1879; re-en. Sec. 123, 1st Div. Comp. Stat. 1887; amd. Sec. 803, C. Civ. Proc. 1895; re-en. Sec. 6598, Rev. C. 1907; re-en. Sec. 9196, R.C.M. 1921; Cal. C. Civ. Proc. Secs. 481, 482; re-en. Sec. 9196, R.C.M. 1935; R.C.M. 1947, 93-4004(part).

27-16-204. Plaintiff's undertaking. Before making the order, the judge must require a written undertaking on the part of the plaintiff, with at least two sufficient sureties, to the effect that, if the defendant recover judgment or if the court shall finally decide that the plaintiff was not entitled to an order of arrest, the plaintiff will pay all costs and charges that may be awarded to the defendant and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking, which shall be at least $500.

History: En. Secs. 75, 76, p. 148, L. 1867; re-en. Sec. 83, p. 44, Cod. Stat. 1871; re-en. Sec. 121, p. 69, L. 1877; re-en. Sec. 121, 1st Div. Rev. Stat. 1879; re-en. Sec. 123, 1st Div. Comp. Stat. 1887; amd. Sec. 803, C. Civ. Proc. 1895; re-en. Sec. 6598, Rev. C. 1907; re-en. Sec. 9196, R.C.M. 1921; Cal. C. Civ. Proc. Secs. 481, 482; re-en. Sec. 9196, R.C.M. 1935; R.C.M. 1947, 93-4004(part).

27-16-205. Affidavits of sureties — filing of undertaking. Each of the sureties must annex to the undertaking an affidavit that he is a resident and householder or freeholder within the state and worth double the sum specified in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution. The undertaking must be filed with the clerk of the court.

History: En. Sec. 76, p. 148, L. 1867; re-en. Sec. 84, p. 44, Cod. Stat. 1871; re-en. Sec. 122, p. 69, L. 1877; re-en. Sec. 122, 1st Div. Rev. Stat. 1879; re-en. Sec. 124, 1st Div. Comp. Stat. 1887; re-en. Sec. 804, C. Civ. Proc. 1895; re-en. Sec. 6599, Rev. C. 1907; re-en. Sec. 9197, R.C.M. 1921; re-en. Sec. 9197, R.C.M. 1935; R.C.M. 1947, 93-4005.

27-16-206. Directions to sheriff in order. The order must require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum and to return the order at a time therein mentioned to the clerk of the court in which the action is pending.

History: En. Sec. 77, p. 148, L. 1867; re-en. Sec. 85, p. 44, Cod. Stat. 1871; re-en. Sec. 123, p. 69, L. 1877; re-en. Sec. 123, 1st Div. Rev. Stat. 1879; re-en. Sec. 125, 1st Div. Comp. Stat. 1887; re-en. Sec. 805, C. Civ. Proc. 1895; re-en. Sec. 6600, Rev. C. 1907; re-en. Sec. 9198, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 483; re-en. Sec. 9198, R.C.M. 1935; R.C.M. 1947, 93-4006(part).

27-16-207. Service of order and affidavit. The order of arrest, with a copy of the affidavit upon which it is made, must be delivered to the sheriff, who, upon arresting the defendant, shall deliver him a copy of the affidavit and also, if defendant desires, a copy of the order of arrest.

History: En. Sec. 78, p. 149, L. 1867; re-en. Sec. 86, p. 45, Cod. Stat. 1871; re-en. Sec. 124, p. 69, L. 1877; re-en. Sec. 124, 1st Div. Rev. Stat. 1879; re-en. Sec. 126, 1st Div. Comp. Stat. 1887; re-en. Sec. 806, C. Civ. Proc. 1895; re-en. Sec. 6601, Rev. C. 1907; re-en. Sec. 9199, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 484; re-en. Sec. 9199, R.C.M. 1935; R.C.M. 1947, 93-4007.

27-16-208. Execution of order — prepayment of expense by plaintiff. The sheriff must execute the order by arresting the defendant and keeping him in custody until discharged by law. But the sheriff is not bound to keep such person under arrest more than 24 hours unless the plaintiff advance each day the expense of keeping such person, which expense shall be taxed as costs in the action and in no case shall be a charge against the county.

History: En. Sec. 79, p. 149, L. 1867; en. Sec. 87, p. 45, Cod. Stat. 1871; re-en. Sec. 125, p. 69, L. 1877; re-en. Sec. 125, 1st Div. Rev. Stat. 1879; re-en. Sec. 127, 1st Div. Comp. Stat. 1887; re-en. Sec. 807, C. Civ. Proc. 1895; re-en. Sec. 6602, Rev. C. 1907; re-en. Sec. 9200, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 485; re-en. Sec. 9200, R.C.M. 1935; R.C.M. 1947, 93-4008.

27-16-209. Liability of sheriff for escape or rescue. If after being arrested the defendant escape or be rescued, the sheriff is liable as bail, but he may discharge himself from such liability by the giving and justification of bail at any time before judgment.

History: En. Sec. 95, p. 151, L. 1867; re-en. Sec. 103, p. 48, Cod. Stat. 1871; re-en. Sec. 141, p. 73, L. 1877; re-en. Sec. 141, 1st Div. Rev. Stat. 1879; re-en. Sec. 143, 1st Div. Comp. Stat. 1887; re-en. Sec. 823, C. Civ. Proc. 1895; re-en. Sec. 6618, Rev. C. 1907; re-en. Sec. 9216, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 501; re-en. Sec. 9216, R.C.M. 1935; R.C.M. 1947, 93-4024.

27-16-210. Recovery on sheriff's official bond. If a judgment be recovered against the sheriff upon his liability as bail and an execution thereon be returned unsatisfied in whole or in part, the same proceeding may be had on his official bond for the recovery of the whole or any deficiency as in other cases of delinquency.

History: En. Sec. 96, p. 151, L. 1867; re-en. Sec. 104, p. 48, Cod. Stat. 1871; re-en. Sec. 142, p. 73, L. 1877; re-en. Sec. 142, 1st Div. Rev. Stat. 1879; re-en. Sec. 144, 1st Div. Comp. Stat. 1887; re-en. Sec. 824, C. Civ. Proc. 1895; re-en. Sec. 6619, Rev. C. 1907; re-en. Sec. 9217, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 502; re-en. Sec. 9217, R.C.M. 1935; R.C.M. 1947, 93-4025.

Part 3

Vacation of Order — Reduction of Bail

27-16-301. Proceedings to vacate order or reduce bail. A defendant arrested may, at any time before justification of bail, apply to the judge who made the order or the court in which the action is pending, upon reasonable notice to the plaintiff, to vacate the order of arrest or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs in addition to those on which the order of arrest was made.

History: En. Sec. 97, p. 151, L. 1867; re-en. Sec. 105, p. 48, Cod. Stat. 1871; re-en. Sec. 143, p. 73, L. 1877; re-en. Sec. 143, 1st Div. Rev. Stat. 1879; re-en. Sec. 145, 1st Div. Comp. Stat. 1887; re-en. Sec. 825, C. Civ. Proc. 1895; re-en. Sec. 6620, Rev. C. 1907; re-en. Sec. 9218, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 503; re-en. Sec. 9218, R.C.M. 1935; R.C.M. 1947, 93-4026.

27-16-302. When order vacated or bail reduced. If, upon such application, it satisfactorily appears that there was not sufficient cause for the arrest, the order shall be vacated; or if it satisfactorily appears that the bail was fixed too high, the amount shall be reduced.

History: En. Sec. 98, p. 151, L. 1867; re-en. Sec. 106, p. 48, Cod. Stat. 1871; re-en. Sec. 144, p. 73, L. 1877; re-en. Sec. 144, 1st Div. Rev. Stat. 1879; re-en. Sec. 146, 1st Div. Comp. Stat. 1887; re-en. Sec. 826, C. Civ. Proc. 1895; re-en. Sec. 6621, Rev. C. 1907; re-en. Sec. 9219, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 504; re-en. Sec. 9219, R.C.M. 1935; R.C.M. 1947, 93-4027.

Part 4

Giving Bail

27-16-401. Discharge of defendant upon giving bail before execution. The defendant, at any time before execution, is discharged from arrest either upon giving bail or upon depositing the amount mentioned in the order, as provided in this chapter.

History: En. Sec. 80, p. 149, L. 1867; re-en. Sec. 88, p. 45, Cod. Stat. 1871; re-en. Sec. 126, p. 70, L. 1877; re-en. Sec. 126, 1st Div. Rev. Stat. 1879; re-en. Sec. 128, 1st Div. Comp. Stat. 1887; re-en. Sec. 808, C. Civ. Proc. 1895; re-en. Sec. 6603, Rev. C. 1907; re-en. Sec. 9201, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 486; re-en. Sec. 9201, R.C.M. 1935; R.C.M. 1947, 93-4009.

27-16-402. Form of undertaking for bail. The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, stating their places of residence and occupations, to the effect that they are bound in the amount mentioned in the order of arrest, that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action and to such as may be issued to enforce the judgment therein or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.

History: En. Sec. 81, p. 149, L. 1867; re-en. Sec. 89, p. 45, Cod. Stat. 1871; re-en. Sec. 127, p. 70, L. 1877; re-en. Sec. 127, 1st Div. Rev. Stat. 1879; re-en. Sec. 129, 1st Div. Comp. Stat. 1887; re-en. Sec. 809, C. Civ. Proc. 1895; re-en. Sec. 6604, Rev. C. 1907; re-en. Sec. 9202, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 487; re-en. Sec. 9202, R.C.M. 1935; R.C.M. 1947, 93-4010.

27-16-403. Qualifications of sureties. The qualifications of bail shall be as follows:

(1) Each of them must be a resident and householder or freeholder within the county.

(2) Each must be worth the amount specified in the order of arrest or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the judge or clerk, on justification, may allow more than two sureties to justify severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

History: En. Sec. 88, p. 150, L. 1867; re-en. Sec. 96, p. 46, Cod. Stat. 1871; re-en. Sec. 134, p. 71, L. 1877; re-en. Sec. 134, 1st Div. Rev. Stat. 1879; re-en. Sec. 136, 1st Div. Comp. Stat. 1887; re-en. Sec. 816, C. Civ. Proc. 1895; re-en. Sec. 6611, Rev. C. 1907; re-en. Sec. 9209, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 494; re-en. Sec. 9209, R.C.M. 1935; R.C.M. 1947, 93-4017.

27-16-404. Filing of order with return and undertaking — plaintiff's notice of nonacceptance. (1) Within the time limited for that purpose, the sheriff must file the order of arrest in the office of the clerk of the court in which the action is pending, with his return endorsed thereon, together with a copy of the undertaking of the bail. The original undertaking he must retain in his possession until filed, as herein provided.

(2) The plaintiff, within 10 days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted them and the sheriff shall be exonerated from liability. If no notice be served within 10 days, the original undertaking must be filed with the clerk of the court.

History: En. Sec. 86, p. 150, L. 1867; re-en. Sec. 94, p. 46, Cod. Stat. 1871; re-en. Sec. 132, p. 71, L. 1877; re-en. Sec. 132, 1st Div. Rev. Stat. 1879; re-en. Sec. 134, 1st Div. Comp. Stat. 1887; re-en. Sec. 814, C. Civ. Proc. 1895; re-en. Sec. 6609, Rev. C. 1907; re-en. Sec. 9207, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 492; re-en. Sec. 9207, R.C.M. 1935; R.C.M. 1947, 93-4015.

27-16-405. Notice of justification of sureties — new undertaking. Within 5 days after receipt of notice, the sheriff or defendant may give to the plaintiff or his attorney notice of the justification of the same or other bail (specifying the place of residence and occupation of the latter) before a judge of the court or clerk thereof, at a specified time and place, the time not to be less than 5 or more than 10 days thereafter, except by consent of parties. In case other bail is given, there shall be a new undertaking.

History: En. Sec. 87, p. 150, L. 1867; re-en. Sec. 95, p. 46, Cod. Stat. 1871; re-en. Sec. 133, p. 71, L. 1877; re-en. Sec. 133, 1st Div. Rev. Stat. 1879; re-en. Sec. 135, 1st Div. Comp. Stat. 1887; re-en. Sec. 815, C. Civ. Proc. 1895; re-en. Sec. 6610, Rev. C. 1907; re-en. Sec. 9208, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 493; re-en. Sec. 9208, R.C.M. 1935; R.C.M. 1947, 93-4016.

27-16-406. Procedure for justification. For the purpose of justification, each of the bail must attend before the judge or clerk at the time and place mentioned in the notice and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or clerk, in his discretion, may think proper. The examination shall be reduced to writing and subscribed by the bail if required by the plaintiff.

History: En. Sec. 89, p. 150, L. 1867; re-en. Sec. 97, p. 47, Cod. Stat. 1871; re-en. Sec. 135, p. 72, L. 1877; re-en. Sec. 135, 1st Div. Rev. Stat. 1879; re-en. Sec. 137, 1st div. Comp. Stat. 1887; re-en. Sec. 817, C. Civ. Proc. 1895; re-en. Sec.

6612, Rev. C. 1907; re-en. Sec. 9210, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 495; re-en. Sec. 9210, R.C.M. 1935; R.C.M. 1947, 93-4018.

27-16-407. Acceptance of sufficiency of sureties by judge or clerk. If the judge or clerk shall find the bail sufficient, he must annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed, and the sheriff shall thereupon be exonerated from liability.

History: En. Sec. 90, p. 150, L. 1867; re-en. Sec. 98, p. 47, Cod. Stat. 1871; re-en. Sec. 136, p. 72, L. 1877; re-en. Sec. 136, 1st Div. Rev. Stat. 1879; re-en. Sec. 138, 1st Div. Comp. Stat. 1887; re-en. Sec. 818, C. Civ. Proc. 1895; re-en. Sec. 6613, Rev. C. 1907; re-en. Sec. 9211, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 496; re-en. Sec. 9211, R.C.M. 1935; R.C.M. 1947, 93-4019.

Part 5

Liability and Exoneration of Sureties

27-16-501. Surrender of defendant. At any time before judgment or within 10 days thereafter, the bail may surrender the defendant in their exoneration or he may surrender himself to the sheriff of the county where he was arrested.

History: En. Sec. 82, p. 149, L. 1867; re-en. Sec. 90, p. 45, Cod. Stat. 1871; re-en. Sec. 128, p. 70, L. 1877; re-en. Sec. 128, 1st Div. Rev. Stat. 1879; re-en. Sec. 130, 1st Div. Comp. Stat. 1887; re-en. Sec. 810, C. Civ. Proc. 1895; re-en. Sec. 6605, Rev. C. 1907; re-en. Sec. 9203, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 488; re-en. Sec. 9203, R.C.M. 1935; R.C.M. 1947, 93-4011.

27-16-502. Manner and time of surrender. For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest him or, by a written authority endorsed on a certified copy of the undertaking, may empower the sheriff to do so.

History: En. Sec. 83, p. 149, L. 1867; re-en. Sec. 91, p. 45, Cod. Stat. 1871; re-en. Sec. 129, p. 70, L. 1877; re-en. Sec. 129, 1st Div. Rev. Stat. 1879; re-en. Sec. 131, 1st Div. Comp. Stat. 1887; re-en. Sec. 811, C. Civ. Proc. 1895; re-en. Sec. 6606, Rev. C. 1907; re-en. Sec. 9204, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 489; re-en. Sec. 9204, R.C.M. 1935; R.C.M. 1947, 93-4012(part).

27-16-503. Exoneration of sureties. Upon arrest of the defendant by the sheriff or upon his delivery to the sheriff by the bail or upon his own surrender, the bail shall be exonerated, provided such arrest, delivery, or surrender take place before the expiration of 10 days after judgment; but if such arrest, delivery, or surrender be not made within 10 days after the judgment, the bail shall be finally charged on their undertaking and be bound to pay the amount of the judgment within 10 days thereafter.

History: En. Sec. 83, p. 149, L. 1867; re-en. Sec. 91, p. 45, Cod. Stat. 1871; re-en. Sec. 129, p. 70, L. 1877; re-en. Sec. 129, 1st Div. Rev. Stat. 1879; re-en. Sec. 131, 1st Div. Comp. Stat. 1887; re-en. Sec. 811, C. Civ. Proc. 1895; re-en. Sec. 6606, Rev. C. 1907; re-en. Sec. 9204, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 489; re-en. Sec. 9204, R.C.M. 1935; R.C.M. 1947, 93-4012(part).

27-16-504. Action to enforce sureties' liability. If the bail neglect or refuse to pay the judgment within 10 days after they are finally charged, an action may be commenced against such bail for the amount of such original judgment.

History: En. Sec. 84, p. 149, L. 1867; re-en. Sec. 92, p. 45, Cod. Stat. 1871; re-en. Sec. 130, p. 70, L. 1877; re-en. Sec. 130, 1st Div. Rev. Stat. 1879; re-en.

Sec. 132, 1st Div. Comp. Stat. 1887; re-en. Sec. 812, C. Civ. Proc. 1895; re-en. Sec. 6607, Rev. C. 1907; re-en. Sec. 9205, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 490; re-en. Sec. 9205, R.C.M. 1935; R.C.M. 1947, 93-4013.

27-16-505. Other circumstances in which sureties exonerated. The bail must also be exonerated by the death of the defendant, his imprisonment in the state penitentiary or prison, or his legal discharge from the obligation to render himself amenable to the process.

History: En. Sec. 85, p. 149, L. 1867; re-en. Sec. 93, p. 46, Cod. Stat. 1871; re-en. Sec. 131, p. 71, L. 1877; re-en. Sec. 131, 1st Div. Rev. Stat. 1879; re-en. Sec. 133, 1st Div. Comp. Stat. 1887; re-en. Sec. 813, C. Civ. Proc. 1895; re-en. Sec. 6608, Rev. C. 1907; re-en. Sec. 9206, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 491; re-en. Sec. 9206, R.C.M. 1935; R.C.M. 1947, 93-4014.

Part 6

Deposit of Money in Lieu of Bail

27-16-601. Deposit of money by defendant with sheriff. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of bail be reduced, as provided in this chapter, the defendant may deposit such amount instead of giving bail. In either case, the sheriff shall give the defendant a certificate of the deposit made, and the defendant shall be discharged from custody.

History: En. Sec. 91, p. 150, L. 1867; re-en. Sec. 99, p. 47, Cod. Stat. 1871; re-en. Sec. 137, p. 72, L. 1877; re-en. Sec. 137, 1st Div. Rev. Stat. 1879; re-en. Sec. 139, 1st Div. Comp. Stat. 1887; re-en. Sec. 819, C. Civ. Proc. 1895; re-en. Sec. 6614, Rev. C. 1907; re-en. Sec. 9212, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 497; re-en. Sec. 9212, R.C.M. 1935; R.C.M. 1947, 93-4020.

27-16-602. Sheriff to pay money into court — certificates of payment. The sheriff must, immediately after the deposit, pay the same into court and take from the clerk receiving the same two certificates of such payment, one of which he must deliver or transmit to the plaintiff or his attorney and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff to collect the sum deposited as in other cases of delinquency.

History: En. Sec. 92, p. 151, L. 1867; re-en. Sec. 100, p. 47, Cod. Stat. 1871; re-en. Sec. 138, p. 72, L. 1877; re-en. Sec. 138, 1st Div. Rev. Stat. 1879; re-en. Sec. 140, 1st Div. Comp. Stat. 1887; re-en. Sec. 820, C. Civ. Proc. 1895; re-en. Sec. 6615, Rev. C. 1907; re-en. Sec. 9213, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 498; re-en. Sec. 9213, R.C.M. 1935; R.C.M. 1947, 93-4021.

27-16-603. Substituting bail for deposit. If money be deposited, as provided in 27-16-601 and 27-16-602, bail may be given and may justify upon notice at any time before judgment; and on the filing of the undertaking and justification with the clerk, the money deposited shall be refunded by such clerk to the defendant.

History: En. Sec. 93, p. 151, L. 1867; re-en. Sec. 101, p. 47, Cod. Stat. 1871; re-en. Sec. 139, p. 72, L. 1877; re-en. Sec. 139, 1st Div. Rev. Stat. 1879; re-en. Sec. 141, 1st Div. Comp. Stat. 1887; re-en. Sec. 821, C. Civ. Proc. 1895; re-en. Sec. 6616, Rev. C. 1907; re-en. Sec. 9214, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 499; re-en. Sec. 9214, R.C.M 1935; R.C.M. 1947, 93-4022.

27-16-604. Disposition of deposited money after judgment. Where money shall have been deposited, if it remains on deposit at the time of recovery of a judgment in favor of the plaintiff, the clerk must, under direction of the court, apply the same in satisfaction thereof and, after satisfying the judgment, refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk must, under the direction of the court, refund him the whole sum deposited and remaining unapplied.

History: En. Sec. 94, p. 151, L. 1867; re-en. Sec. 102, p. 48, Cod. Stat. 1871; re-en. Sec. 140, p. 73, L. 1877; re-en. Sec. 140, 1st Div. Rev. Stat. 1879; re-en. Sec. 142, 1st Div. Comp. Stat. 1887; re-en. Sec. 822, C. Civ. Proc. 1895; re-en. Sec. 6617, Rev. C. 1907; re-en. Sec. 9215, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 500; re-en. Sec. 9215, R.C.M. 1935; R.C.M. 1947, 93-4023.

Parts 7 through 9 reserved

Part 10

Arrest in Civil Actions in Justice's Court

27-16-1001. Justice's authority to order arrest. An order to arrest the defendant may be endorsed on a summons issued by the justice, and the defendant may be arrested thereon by the sheriff or constable at the time of serving the summons and brought before the justice and there detained until duly discharged, in the cases mentioned in 27-16-102.

History: En. Sec. 560, p. 153, Bannack Stat.; re-en. Sec. 666, p. 170, Cod. Stat. 1871; re-en. Sec. 726, 1st Div. Rev. Stat. 1879; re-en. Sec. 746, 1st Div. Comp. Stat. 1887; amd. Sec. 1540, C. Civ. Proc. 1895; re-en. Sec. 7019, Rev. C. 1907; re-en. Sec. 9652, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 861; re-en. Sec. 9652, R.C.M. 1935; R.C.M. 1947, 93-6901.

27-16-1002. Plaintiff's affidavit and undertaking. Before an order of arrest can be made, the party applying must prove to the satisfaction of the justice, by the affidavit of himself or some other person, the facts upon which the application is founded. The plaintiff must also execute and deliver to the justice a written undertaking in the sum of $300, with sufficient sureties, to the effect that the plaintiff will pay all costs that may be adjudged to the defendant and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking.

History: En. Sec. 561, p. 154, Bannack Stat.; re-en. Sec. 667, p. 170, Cod. Stat. 1871; re-en. Sec. 727, 1st Div. Rev. Stat. 1879; re-en. Sec. 747, 1st Div. Comp. Stat. 1887; amd. Sec. 1541, C. Civ. Proc. 1895; re-en. Sec. 7020, Rev. C. 1907; re-en. Sec. 9653, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 862; re-en. Sec. 9653, R.C.M. 1935; R.C.M. 1947, 93-6902.

27-16-1003. Defendant to be taken before justice immediately. The defendant, immediately upon being arrested, must be taken to the office of the justice who made the order; and if he is absent or unable to try the action or if it appears to him by the affidavit of defendant that he is a material witness in the action, the officer must immediately take the defendant before another justice of the county, if there is another, and if not, then before a justice of an adjoining county, who must take jurisdiction of the action and proceed thereon as if the summons had been issued and the order of arrest made by him.

History: En. Sec. 562, p. 154, Bannack Stat.; re-en. Sec. 668, p. 171, Cod. Stat. 1871; re-en. Sec. 728, 1st Div. Rev. Stat. 1879; re-en. Sec. 748, 1st Div. Comp. Stat. 1887; amd. Sec. 1542, C. Civ. Proc. 1895; re-en. Sec. 7021, Rev. C. 1907; re-en. Sec. 9654, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 863; re-en. Sec. 9654, R.C.M. 1935; amd. Sec. 18, Ch. 491, L. 1973; R.C.M. 1947, 93-6903.

27-16-1004. Notice to plaintiff of arrest — officer's certificate. The officer making the arrest must immediately give notice thereof to the plaintiff or his attorney or agent and endorse on the summons and subscribe a certificate, stating the time of serving the same and the time of arrest and of his giving notice to the plaintiff.

History: En. Sec. 563, p. 154, Bannack Stat.; re-en. Sec. 669, p. 171, Cod. Stat. 1871; re-en. Sec. 729, 1st Div. Rev. Stat. 1879; re-en. Sec. 749, 1st Div. Comp. Stat. 1887; re-en. Sec. 1543, C. Civ. Proc. 1895; re-en. Sec. 7022, Rev. C. 1907; re-en. Sec. 9655, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 864; re-en. Sec. 9655, R.C.M. 1935; R.C.M. 1947, 93-6904.

27-16-1005. Officer to detain defendant — expenses. The officer making the arrest must keep the defendant in custody until he is discharged by order of the justice. The officer shall not be bound to keep such person under arrest more than 24 hours unless the plaintiff advance each day the expenses of keeping such person, which expense shall be taxed as costs in the action and in no case shall be a charge against the county.

History: En. Sec. 564, p. 154, Bannack Stat.; re-en. Sec. 670, p. 171, Cod. Stat. 1871; re-en. Sec. 730, 1st Div. Rev. Stat. 1879; re-en. Sec. 750, 1st Div. Comp. Stat. 1887; re-en. Sec. 1544, C. Civ. Proc. 1895; re-en. Sec. 7023, Rev. C. 1907; re-en. Sec. 9656, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 865; re-en. Sec. 9656, R.C.M. 1935; R.C.M. 1947, 93-6905.

27-16-1006. Defense against order of arrest. The defendant may file an answer, under oath, putting in issue the facts stated in the affidavit for the order of arrest, which may be tried by the court unless a jury is demanded; and the plaintiff shall be held to establish such facts, and if he fail to do so, the order of arrest shall be dismissed and the defendant may proceed upon the undertaking of the plaintiff for his damages occasioned by the arrest. The defendant may apply to the court to be discharged from arrest upon the ground of the insufficiency of the papers on which the order of arrest was granted.

History: En. Sec. 567, p. 155, Bannack Stat.; re-en. Sec. 673, p. 171, Cod. Stat. 1871; re-en. Sec. 733, 1st Div. Rev. Stat. 1879; re-en. Sec. 753, 1st Div. Comp. Stat. 1887; re-en. Sec. 1545, C. Civ. Proc. 1895; re-en. Sec. 7024, Rev. C. 1907; re-en. Sec. 9657, R.C.M. 1921; re-en. Sec. 9657, R.C.M. 1935; R.C.M. 1947, 93-6906.

CHAPTER 17

CLAIM AND DELIVERY OF PERSONAL PROPERTY

Part 1 — General Provisions

Section
27-17-101. When plaintiff may claim delivery.
27-17-102. Claim and delivery in justice's court.

Part 2 — Procedure for Obtaining Seizure of Property

27-17-201. Plaintiff's affidavit.
27-17-202. Description of property in affidavit.
27-17-203. Order from judge.
27-17-204. Endorsement requiring sheriff to take property.
27-17-205. Plaintiff's undertaking — service and execution by sheriff.
27-17-206. Manner of seizure of concealed property.
27-17-207. Seizure when part of property cannot be found.

Part 3 — Procedure Following Seizure by Sheriff

27-17-301. Duty of sheriff to keep and deliver property.
27-17-302. Sheriff's return of execution.
27-17-303. Exception to plaintiff's sureties — justification — liability of sheriff.
27-17-304. When defendant may require return of property — his undertaking.
27-17-305. Return of part of the property.
27-17-306. Justification of defendant's sureties — liability of sheriff.
27-17-307. Procedure for qualification and justification of sureties.
27-17-308. Delivery of property to plaintiff if not returned to defendant.
27-17-309. Claim of property by third person — plaintiff to indemnify sheriff.
27-17-310. Answer of defendant claiming third person entitled to property.

Part 4 — Judgment—Return of Property

27-17-401. Form of judgment.
27-17-402. Duty to return property in good condition.
27-17-403. Action for value of property and damages.
27-17-404. Return of damaged property to officer for sale.
27-17-405. Continuing liability of sureties.

Part 1

General Provisions

27-17-101. When plaintiff may claim delivery. The plaintiff in an action to recover possession of personal property may, at the time of issuing summons or at any time thereafter before answer, claim the delivery of such property to him, as provided in this chapter.

History: En. Sec. 71, p. 56, Bannack Stat.; re-en. Sec. 99, p. 151, L. 1867; re-en. Sec. 116, p. 49, Cod. Stat. 1871; re-en. Sec. 154, p. 75, L. 1877; re-en. Sec. 154, 1st Div. Rev. Stat. 1879; re-en. Sec. 156, 1st Div. Comp. Stat. 1887; re-en. Sec. 840, C. Civ. Proc. 1895; re-en. Sec. 6622, Rev. C. 1907; re-en. Sec. 9220, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 509; re-en. Sec. 9220, R.C.M. 1935; R.C.M. 1947, 93-4101.

27-17-102. Claim and delivery in justice's court. Parts 2, 3, and 4 of this chapter and Rule 55(b)(2), M.R.Civ.P., are applicable to such claim when made in justices' courts, the powers therein given and duties imposed on sheriffs being extended to constables and the word "justice" substituted for "judge", and the justice, instead of the plaintiff or his attorney, may, in his discretion, by an endorsement in writing upon the affidavit, order the sheriff or constable to take the property mentioned in the affidavit.

History: En. Sec. 572, p. 156, Bannack Stat.; re-en. Sec. 678, p. 172, Cod. Stat. 1871; re-en. Sec. 738, 1st Div. Comp. Stat. 1879; re-en. Sec. 758, 1st Div. Comp.

Stat. 1887; amd. Sec. 1570, C. Civ. Proc. 1895; re-en. Sec. 7030, Rev. C. 1907; re-en. Sec. 9663, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 870; re-en. Sec. 9663, R.C.M. 1935; R.C.M. 1947, 93-6912(part).

Part 2

Procedure for Obtaining Seizure of Property

27-17-201. Plaintiff's affidavit. When a delivery is claimed, an affidavit must be made by the person claiming the property or someone in his behalf, stating:

(1) facts which establish reasonable belief that the person claiming the property is the owner or is lawfully entitled to possession and that the seizure is necessary to prevent the removal or destruction of the property;

(2) that the property is wrongfully detained by the defendant;

(3) that the same has not been taken for a tax, assessment, or fine, pursuant to statute, or seized under an execution or an attachment against the property of the person claiming the property or, if so seized, that it is by statute exempt from seizure; and

(4) a particular description of the property and the actual value of the property.

History: En. Sec. 72, p. 56, Bannack Stat.; amd. Sec. 100, p. 151, L. 1867; re-en. Sec. 117, p. 49, Cod. Stat. 1871; re-en. Sec. 155, p. 75, L. 1877; re-en. Sec. 155, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 103, L. 1885; re-en. Sec. 157, 1st Div. Comp. Stat. 1887; re-en. Sec. 841, C. Civ. Proc. 1895; re-en. Sec. 6623, Rev. C. 1907; re-en. Sec. 9221, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 510; re-en. Sec. 9221, R.C.M. 1935; amd. Sec. 1, Ch. 362, L. 1975; R.C.M. 1947, 93-4102(1).

27-17-202. Description of property in affidavit. Where the affidavit describes two or more chattels of the same kind, it must state the number thereof, and where it describes a chattel in bulk, it must state the weight, measurement, or other quantity, as nearly as can be ascertained. Where it describes two or more chattels, it may, at the election of the plaintiff, state the aggregate value of all or, separately, the value of any chattel or of any class of chattels and the aggregate value of the remainder, if any.

History: En. Sec. 856, C. Civ. Proc. 1895; re-en. Sec. 6638, Rev. C. 1907; re-en. Sec. 9236, R.C.M. 1921; re-en. Sec. 9236, R.C.M. 1935; R.C.M. 1947, 93-4117(part).

27-17-203. Order from judge. The sheriff shall make no seizure unless an order from a judge of the court having jurisdiction of the cause is attached to the affidavit. The judge may sign such an order if he is satisfied:

(1) that the party seeking possession of the property has made a prima facie showing of his right to possession and the necessity for seizure at a show cause hearing before him with at least 3 days' notice to the person in possession of the property; if such person cannot be found for personal service, notice posted on the property and in three public places in the county where the property is located is sufficient service for this purpose; or

(2) that the delay caused by notice and a hearing would seriously impair the remedy sought by the party seeking possession. Evidence of such impairment must be presented in open court, and the court must set forth with specificity the reasons why such delay would seriously impair the remedy sought by the person seeking possession.

History: En. Sec. 72, p. 56, Bannack Stat.; amd. Sec. 100, p. 151, L. 1867; re-en. Sec. 117, p. 49, Cod. Stat. 1871; re-en. Sec. 155, p. 75, L. 1877; re-en. Sec.

155, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 103, L. 1885; re-en. Sec. 157, 1st Div. Comp. Stat. 1887; re-en. Sec. 841, C. Civ. Proc. 1895; re-en. Sec. 6623, Rev. C. 1907; re-en. Sec. 9221, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 510; re-en. Sec. 9221, R.C.M. 1935; amd. Sec. 1, Ch. 362, L. 1975; R.C.M. 1947, 93-4102(2).

27-17-204. Endorsement requiring sheriff to take property. The plaintiff or his attorney may thereupon, by an endorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be to take the same from the defendant.

History: En. Sec. 73, p. 56, Bannack Stat.; re-en. Sec. 101, p. 152, L. 1867; re-en. Sec. 118, p. 49, Cod. Stat. 1871; re-en. Sec. 156, p. 76, L. 1877; re-en. Sec. 156, 1st Div. Rev. Stat. 1879; re-en. Sec. 158, 1st Div. Comp. Stat. 1887; re-en. Sec. 842, C. Civ. Proc. 1895; re-en. Sec. 6624, Rev. C. 1907; re-en. Sec. 9222, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 511; re-en. Sec. 9222, R.C.M. 1935; R.C.M. 1947, 93-4103.

27-17-205. Plaintiff's undertaking — service and execution by sheriff. Upon receipt of the affidavit and notice with a written undertaking, executed by two or more sufficient sureties approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit for the prosecution of the action, and for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, the sheriff must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He must also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken or, if neither can be found, by leaving them at the usual place of abode of either with some person of suitable age and discretion or, if neither have any known place of abode, by putting them in the nearest post office, directed to the defendant.

History: En. Sec. 74, p. 56, Bannack Stat.; en. Sec. 102, p. 152, L. 1867; re-en. Sec. 119, p. 49, Cod. Stat. 1871; re-en. Sec. 157, p. 76, L. 1877; re-en. Sec. 157, 1st Div. Rev. Stat. 1879; re-en. Sec. 159, 1st Div. Comp. Stat. 1887; re-en. Sec. 843, C. Civ. Proc. 1895; re-en. Sec. 6625, Rev. C. 1907; re-en. Sec. 9223, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 512; re-en. Sec. 9223, R.C.M. 1935; R.C.M. 1947, 93-4104.

27-17-206. Manner of seizure of concealed property. If the property or any part thereof be concealed in a building or enclosure, the sheriff shall publicly demand its delivery; if it be not delivered, he shall cause the building or enclosure to be broken open and take the property into his possession and, if necessary, he may call to his aid the power of the county.

History: En. Sec. 107, p. 152, L. 1867; re-en. Sec. 124, p. 50, Cod. Stat. 1871; re-en. Sec. 166, p. 79, L. 1877; re-en. Sec. 166, 1st Div. Rev. Stat. 1879; re-en. Sec. 168, 1st Div. Comp. Stat. 1887; re-en. Sec. 852, C. Civ. Proc. 1895; re-en. Sec. 6634, Rev. C. 1907; re-en. Sec. 9232, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 517; re-en. Sec. 9232, R.C.M. 1935; R.C.M. 1947, 93-4113.

27-17-207. Seizure when part of property cannot be found. The sheriff must take a less number or quantity if the whole of the property described in the affidavit cannot be found.

History: En. Sec. 857, C. Civ. Proc. 1895; re-en. Sec. 6639, Rev. C. 1907; re-en. Sec. 9237, R.C.M. 1921; re-en. Sec. 9237, R.C.M. 1935; R.C.M. 1947, 93-4118.

Part 3

Procedure Following Seizure by Sheriff

27-17-301. Duty of sheriff to keep and deliver property. When the sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place and deliver it to the party entitled thereto upon receiving his lawful fees for taking and his necessary expenses for keeping the same.

History: En. Sec. 108, p. 153, L. 1867; re-en. Sec. 125, p. 51, Cod. Stat. 1871; re-en. Sec. 167, p. 79, L. 1877; re-en. Sec. 167, 1st Div. Rev. Stat. 1879; re-en. Sec. 169, 1st Div. Comp. Stat. 1887; re-en. Sec. 853, C. Civ. Proc. 1895; re-en. Sec. 6635, Rev. C. 1907; re-en. Sec. 9233, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 518; re-en. Sec. 9233, R.C.M. 1935; R.C.M. 1947, 93-4114.

27-17-302. Sheriff's return of execution. The sheriff shall file the notice, undertaking, and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending within 20 days after taking the property mentioned therein.

History: En. Sec. 110, p. 153, L. 1867; re-en. Sec. 127, p. 51, Cod. Stat. 1871; re-en. Sec. 169, p. 79, L. 1877; re-en. Sec. 169, 1st Div. Rev. Stat. 1879; re-en. Sec. 171, 1st Div. Comp. Stat. 1887; re-en. Sec. 855, C. Civ. Proc. 1895; re-en. Sec. 6637, Rev. C. 1907; re-en. Sec. 9235, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 520; re-en. Sec. 9235, R.C.M. 1935; R.C.M. 1947, 93-4116.

27-17-303. Exception to plaintiff's sureties — justification — liability of sheriff. The defendant may, within 2 days after service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to have waived all objections to them. When the defendant excepts, the sureties must justify on notice in like manner as upon bail on arrest; and the sheriff is responsible for the sufficiency of the sureties until the objection to them is waived, as above provided, or until they justify. If the defendant except to the sureties, he cannot claim the property, as provided in 27-17-304.

History: En. Sec. 103, p. 152, L. 1867; re-en. Sec. 120, p. 50, Cod. Stat. 1871; re-en. Sec. 158, p. 76, L. 1877; re-en. Sec. 158, 1st Div. Rev. Stat. 1879; re-en. Sec. 160, 1st Div. Comp. Stat. 1887; re-en. Sec. 844, C. Civ. Proc. 1895; re-en. Sec. 6626, Rev. C. 1907; re-en. Sec. 9224, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 513; re-en. Sec. 9224, R.C.M. 1935; R.C.M. 1947, 93-4105.

27-17-304. When defendant may require return of property — his undertaking. At any time before the delivery of the property to the plaintiff, the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant.

History: En. Sec. 104, p. 152, L. 1867; re-en. Sec. 121, p. 50, Cod. Stat. 1871; re-en. Sec. 163, p. 78, L. 1877; re-en. Sec. 163, 1st Div. Rev. Stat. 1879; re-en. Sec. 165, 1st Div. Comp. Stat. 1887; re-en. Sec. 849, C. Civ. Proc. 1895; re-en. Sec. 6631, Rev. C. 1907; re-en. Sec. 9229, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 514; re-en. Sec. 9229, R.C.M. 1935; R.C.M. 1947, 93-4110(part).

27-17-305. Return of part of the property. Where the plaintiff's affidavit states separately the value of one or more chattels or classes of chattels, the defendant may require, as prescribed in this chapter, the return of any or all of the chattels or classes of chattels the value of which is thus stated or of the portion thereof which has been taken.

History: En. Sec. 856, C. Civ. Proc. 1895; re-en. Sec. 6638, Rev. C. 1907; re-en. Sec. 9236, R.C.M. 1921; re-en. Sec. 9236, R.C.M. 1935; R.C.M. 1947, 93-4117(part).

27-17-306. Justification of defendant's sureties — liability of sheriff. The defendant's sureties, upon notice to the plaintiff of not less than 2 or more than 5 days, shall justify before the judge or clerk in the same manner as upon bail on arrest, and upon such justification the sheriff must deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify or until the justification is completed or expressly waived and may retain the property until that time; but if they or others in their place fail to justify at the time or place appointed, he shall deliver the property to the plaintiff.

History: En. Sec. 105, p. 152, L. 1867; re-en. Sec. 122, p. 50, Cod. Stat. 1871; re-en. Sec. 164, p. 78, L. 1877; re-en. Sec. 164, 1st Div. Rev. Stat. 1879; re-en. Sec. 166, 1st Div. Comp. Stat. 1887; re-en. Sec. 850, C. Civ. Proc. 1895; re-en. Sec. 6632, Rev. C. 1907; re-en. Sec. 9230, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 515; re-en. Sec. 9230, R.C.M. 1935; R.C.M. 1947, 93-4111.

27-17-307. Procedure for qualification and justification of sureties. The qualification of sureties and their justification shall be such as are prescribed by chapter 16 in respect to bail upon an order of arrest.

History: En. Sec. 106, p. 152, L. 1867; re-en. Sec. 123, p. 50, Cod. Stat. 1871; re-en. Sec. 165, p. 78, L. 1877; re-en. Sec. 165, 1st Div. Rev. Stat. 1879; re-en. Sec. 167, 1st Div. Comp. Stat. 1887; re-en. Sec. 851, C. Civ. Proc. 1895; re-en. Sec. 6633, Rev. C. 1907; re-en. Sec. 9231, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 516; re-en. Sec. 9231, R.C.M. 1935; R.C.M. 1947, 93-4112.

27-17-308. Delivery of property to plaintiff if not returned to defendant. If a return of the property be not required within 5 days after the taking and serving notice to the defendant, it shall be delivered to the plaintiff, except as provided in 27-17-309. If the defendant procures a return under 27-17-305, the remainder must be delivered to the plaintiff, except as is otherwise prescribed in this chapter.

History: Ap. p. Sec. 104, p. 152, L. 1867; re-en. Sec. 121, p. 50, Cod. Stat. 1871; re-en. Sec. 163, p. 78, L. 1877; re-en. Sec. 163, 1st Div. Rev. Stat. 1879; re-en. Sec. 165, 1st Div. Comp. Stat. 1887; re-en. Sec. 849, C. Civ. Proc. 1895; re-en. Sec. 6631, Rev. C. 1907; re-en. Sec. 9229, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 514; re-en. Sec. 9229, R.C.M. 1935; Sec. 93-41110, R.C.M. 1947; Ap. p. Sec. 856, C. Civ. Proc. 1895; re-en. Sec. 6638, Rev. C. 1907; re-en. Sec. 9236, R.C.M. 1921; re-en. Sec. 9236, R.C.M. 1935; Sec. 93-4117, R.C.M. 1947; R.C.M. 1947, 93-4110(part), 93-4117(part).

27-17-309. Claim of property by third person — plaintiff to indemnify sheriff. If the property taken be claimed by any other person than the defendant or his agent and such person make affidavit of his title thereto or right of the possession thereof, stating the grounds of such right or title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff unless the plaintiff, on demand of him or his agent, indemnify the sheriff against such claim by an undertaking by two sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property, as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders or householders in the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff unless so made.

History: En. Sec. 109, p. 153, L. 1867; re-en. Sec. 126, p. 51, Cod. Stat. 1871; re-en. Sec. 168, p. 79, L. 1877; re-en. Sec. 168, 1st Div. Rev. Stat. 1879; re-en. Sec. 170, 1st Div. Comp. Stat. 1887; re-en. Sec. 854, C. Civ. Proc. 1895; re-en. Sec. 6636, Rev. C. 1907; re-en. Sec. 9234, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 519; re-en. Sec. 9234, R.C.M. 1935; R.C.M. 1947, 93-4115.

27-17-310. Answer of defendant claiming third person entitled to property. The defendant may, by answer, defend on the ground that a third person was entitled to the property, without connecting himself with the latter's title.

History: En. Sec. 858, C. Civ. Proc. 1895; re-en. Sec. 6640, Rev. C. 1907; re-en. Sec. 9238, R.C.M. 1921; re-en. Sec. 9238, R.C.M. 1935; R.C.M. 1947, 93-4119.

Part 4

Judgment — Return of Property

27-17-401. Form of judgment. (1) In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or for the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

(2) The judgment in an action for claim and delivery in justices' courts must be entered substantially in the form required by subsection (1).

History: (1)En. Sec. 176, p. 77, Bannack Stat.; re-en. Sec. 200, p. 174, L. 1867; re-en. Sec. 240, p. 77, Cod. Stat. 1871; re-en. Sec. 291, p. 115, L. 1877; re-en. Sec. 291, 1st Div. Rev. Stat. 1879; re-en. Sec. 303, 1st Div. Comp. Stat. 1887; re-en. Sec. 1193, C. Civ. Proc. 1895; re-en. Sec. 6803, Rev. C. 1907; re-en. Sec. 9406, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 667; re-en. Sec. 9406, R.C.M. 1935; Sec. 93-5704, R.C.M. 1947; (2)En. Sec. 612, p. 164, Bannack Stat.; re-en. Sec. 718, p. 179, Cod. Stat. 1871; re-en. Sec. 778, 1st Div. Rev. Stat. 1879; re-en. Sec. 798, 1st Div. Comp. Stat. 1887; amd. Sec. 1624, C. Civ. Proc. 1895; re-en. Sec. 7050, Rev. C. 1907; re-en. Sec. 9683, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 893; re-en. Sec. 9683, R.C.M. 1935; Sec. 93-7305, R.C.M. 1947; R.C.M. 1947, 93-5704, 93-7305(part).

27-17-402. Duty to return property in good condition. In all cases when a judgment is rendered, in an action to recover the possession of personal property, for the return thereof, or its value in case a return cannot be had, it is the duty of the party against whom such judgment shall be rendered to return the same in as good condition as the same was when possession thereof was taken by him.

History: En. Sec. 159, p. 77, L. 1877; re-en. Sec. 159, 1st Div. Rev. Stat. 1879; re-en. Sec. 161, 1st Div. Comp. Stat. 1887; re-en. Sec. 845, C. Civ. Proc. 1895; re-en. Sec. 6627, Rev. C. 1907; re-en. Sec. 9225, R.C.M. 1921; re-en. Sec. 9225, R.C.M. 1935; R.C.M. 1947, 93-4106.

27-17-403. Action for value of property and damages. In case such property, while in the possession of the party against whom such judgment shall be rendered or while unlawfully detained from the party entitled to the possession thereof, be materially injured or lessened in value by use or otherwise, then a return or offer to return shall not be deemed a compliance with the undertaking given for its return but an action may be maintained for the value thereof, as assessed by the jury or court, and damages for its detention.

History: En. Sec. 160, p. 77, L. 1877; re-en. Sec. 160, 1st Div. Rev. Stat. 1879; re-en. Sec. 162, 1st Div. Comp. Stat. 1887; re-en. Sec. 846, C. Civ. Proc. 1895; re-en. Sec. 6628, Rev. C. 1907; re-en. Sec. 9226, R.C.M. 1921; re-en. Sec. 9226, R.C.M. 1935; R.C.M. 1947, 93-4107.

27-17-404. Return of damaged property to officer for sale. In case such action to recover possession of personal property is brought against any sheriff or other officer who may have levied upon and seized the same under authority of any attachment or other process and judgment shall be rendered in favor of such officer for the return of the property, the party against whom such judgment is rendered may nevertheless make return of said property, notwithstanding the same may have been injured or lessened in value, and thereupon it is the duty of such officer to immediately advertise the same for sale as in cases of sales of property under execution and apply the proceeds of the sale thereof, after paying the costs, towards the payment and satisfaction of any judgment that may have been rendered.

History: En. Sec. 161, p. 77, L. 1877; re-en. Sec. 161, 1st Div. Rev. Stat. 1879; re-en. Sec. 163, 1st Div. Comp. Stat. 1887; re-en. Sec. 847, C. Civ. Proc. 1895; re-en. Sec. 6629, Rev. C. 1907; re-en. Sec. 9227, R.C.M. 1921; re-en. Sec. 9227, R.C.M. 1935; R.C.M. 1947, 93-4108.

27-17-405. Continuing liability of sureties. Such second taking of such property, referred to in 27-17-404, does not release or discharge the sureties on any undertaking given for the return of such property, but an action may be maintained on such undertaking and recovery thereon had unless the property shall have been actually returned in accordance with the judgment rendered.

History: En. Sec. 162, p. 77, L. 1877; re-en. Sec. 162, 1st Div. Rev. Stat. 1879; re-en. Sec. 164, 1st Div. Comp. Stat. 1887; re-en. Sec. 848, C. Civ. Proc. 1895; re-en. Sec. 6630, Rev. C. 1907; re-en. Sec. 9228, R.C.M. 1921; re-en. Sec. 9228, R.C.M. 1935; R.C.M. 1947, 93-4109.

CHAPTER 18

PREJUDGMENT ATTACHMENT

Part 1 — General Provisions

Section
27-18-101. Cases in which property may be attached.
27-18-102. What property subject to attachment.
Sections 27-18-103 through 27-18-110 reserved.
27-18-111. Court record not be to open to public until writ returned.
27-18-112. Attachment book to be kept by county clerk.

Part 2 — Procedure for Obtaining Writ

27-18-201. Time for attaching property.
27-18-202. Plaintiff's affidavit.
27-18-203. Affidavit requirements when debt not yet due.
27-18-204. Plaintiff's undertaking.
27-18-205. When judge may issue writ — notice.

27-18-206. Issuance of several writs to different counties.
27-18-207. Alias writs.

Part 3 — Writ of Attachment—Execution

27-18-301. Form and content of writ — defendant's undertaking to prevent levy.
27-18-302. Filing of undertaking — sheriff's liability.
27-18-303. Order of execution when several writs against same defendant.
27-18-304. When sheriff may require written specification of property to be levied upon.
27-18-305. Security for sheriff's costs.
27-18-306. Sheriff's duty to execute.
27-18-307. Lien of attachment.
27-18-308. Attachment not released by defendant's death.

Part 4 — Manner of Attaching Property

27-18-401. Sheriff to take custody of books and evidences of title.
27-18-402. Real property in defendant's name.
27-18-403. Real property in another's name.
27-18-404. Personal property capable of manual delivery.
27-18-405. Debts, credits, and personal property in control of third person or not capable of manual delivery.
27-18-406. Money, credits, or other property in control of public officer or board.
27-18-407. Liability of third persons controlling property or debts and served by sheriff.
27-18-408. Judgments.
27-18-409. Investment securities and stocks.
27-18-410. Corporate stock — service on secretary of state.
27-18-411. Duty of secretary of state — fees.
27-18-412. Interest of defendant in decedent's estate.
27-18-413. Personal property subject to a security interest.
27-18-414. Duty of secured party.

Part 5 — Proceedings in Aid of Attachment

27-18-501. Examination under oath of defendant or person controlling property or debts — order that property be delivered.
27-18-502. Person holding property to give sheriff certificate of defendant's interest.
27-18-503. Order to person holding property to submit to examination under oath.

Part 6 — Procedure Following Attachment—Return of Writ

27-18-601. Sheriff to retain nonperishable attached property and proceeds of sales.
27-18-602. Claim of attached property by third person — plaintiff to indemnify sheriff.
27-18-603. Sheriff's inventory of attached property — cooperation of persons controlling credits or debts.
27-18-604. Sheriff's return of writ.

Part 7 — Methods of Defending Against Attachment

27-18-701. Right to hearing following seizure without notice — notice of right.
27-18-702. When writ quashed.
Sections 27-18-703 through 27-18-710 reserved.
27-18-711. Motion to discharge writ improperly issued.
27-18-712. Use of affidavits to support or oppose motion.
27-18-713. Decision of court.
Section 27-18-714 reserved.
27-18-715. Exception to plaintiff's sureties.
27-18-716. Justification of sureties.
Sections 27-18-717 through 27-18-720 reserved.
27-18-721. Proceedings to release attachment.

27-18-722. Defendant's undertaking — justification of sureties.
Sections 27-18-723 and 27-18-724 reserved.
27-18-725. Motion to vacate or modify writ or increase security.
27-18-726. Proceedings on motion.
Sections 27-18-727 through 27-18-730 reserved.
27-18-731. Filing of order discharging or releasing attachment of real property.
27-18-732. Release of attachment of real property by clerk when action not prosecuted — filing.

Part 8 — Sale of Attached Property

27-18-801. Sheriff to sell perishable property.
27-18-802. Authority of court to order sale of property.
27-18-803. Notice of application for order to sell.
27-18-804. Sale of property subject to a security interest — disposition of proceeds, security agreement.

Part 9 — Judgment and Subsequent Procedure

27-18-901. Judgment when debt not yet due.
27-18-902. Procedure when defendant recovers judgment.
27-18-903. Judgment for plaintiff — disposition of attached property and proceeds of sales.
27-18-904. Delivery of excess property and proceeds to defendant.
27-18-905. Execution of balance due on judgment.
27-18-906. Procedure when execution returned unsatisfied.

Parts 10 through 14 reserved

Part 15 — Attachment in Justice's Court

27-18-1501. Justice's authority to issue writ.
27-18-1502. Plaintiff's undertaking.
27-18-1503. Exception to sureties — justification.
27-18-1504. Form and content of writ — defendant's undertaking to prevent levy.
27-18-1505. Security for sheriff's costs.
27-18-1506. Applicability of procedure in district court.

Part 1

General Provisions

27-18-101. Cases in which property may be attached. (1) Property may be attached in:

(a) an action upon a contract, express or implied, for the direct payment of money where the contract:

(i) is not secured by any mortgage or lien upon real property; or

(ii) is originally secured and such security has, without any act of the plaintiff or the person to whom the security was given, become valueless; and

(b) an action based upon a statutory stockholders' liability.

(2) Attachment may not issue if the defendant gives security to pay the judgment.

History: En. Sec. 890, C. Civ. Proc. 1895; re-en. Sec. 6656, Rev. C. 1907; re-en. Sec. 9256, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 537; amd. Sec. 1, Ch. 82, L. 1931; re-en. Sec. 9256, R.C.M. 1935; amd. Sec. 11-159, Ch. 264, L. 1963; amd. Sec. 1, Ch. 299, L. 1977; R.C.M. 1947, 93-4301(2), (3).

27-18-102. What property subject to attachment. (1) The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profits thereon, all debts due such defendant, and all other property in this state of such defendant not exempt from execution may be attached and, if judgment be recovered, sold to satisfy the judgment and execution.

(2) In any action where the amount sued for is $10 or less, no writ of attachment shall be issued and levied upon or against the wages or earnings of the debtor or defendant for his personal services rendered at any time within 30 days next preceding the commencement of the action, and in any such case or action such wages and earnings are exempt from attachment.

History: (1)En. Sec. 95, p. 61, Bannack Stat.; amd. Sec. 124, p. 157, L. 1867; re-en. Sec. 141, p. 55, Cod. Stat. 1871; re-en. Sec. 183, p. 84, L. 1877; re-en. Sec. 183, 1st Div. Rev. Stat. 1879; re-en. Sec. 185, 1st Div. Comp. Stat. 1887; re-en. Sec. 894, C. Civ. Proc. 1895; re-en. Sec. 6661, Rev. C. 1907; re-en. Sec. 9261, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 541; re-en. Sec. 9261, R.C.M. 1935; Sec. 93-4306, R.C.M. 1947; (2)En. Sec. 1, Ch. 49, Ex. L. 1933; re-en. Sec. 9429.1, R.C.M. 1935; Sec. 93-5817, R.C.M. 1947; R.C.M. 1947, 93-4306, 93-5817.

27-18-103 through 27-18-110 reserved.

27-18-111. Court record not to be open to public until writ returned. In cases of attachment, the clerk of the court with whom the complaint is filed must not make public the fact of the filing of the complaint or the issuing of such attachment until after the filing of return of service of attachment.

History: En. Sec. 1136, Pol. C. 1895; re-en. Sec. 438, Rev. C. 1907; re-en. Sec. 455, R.C.M. 1921; Cal. Pol. C. Sec. 1032; re-en. Sec. 455, R.C.M. 1935; amd. Sec. 1, Ch. 112, L. 1945; R.C.M. 1947, 59-512(part).

27-18-112. Attachment book to be kept by county clerk. There must be kept in the office of the county clerk of each county a book called "attachment book", in which must be entered by such clerk, in alphabetical order, the names of all persons against whom any writ or notice of attachment has been filed in his office. There must also be entered in said book the time such writ or notice was filed. Such entry must be made under an appropriate head for that purpose.

History: En. Sec. 203, p. 89, L. 1877; re-en. Sec. 203, 1st Div. Rev. Stat. 1879; re-en. Sec. 205, 1st Div. Comp. Stat. 1887; amd. Sec. 924, C. Civ. Proc. 1895; re-en. Sec. 6691, Rev. C. 1907; re-en. Sec. 9293, R.C.M. 1921; re-en. Sec. 9293, R.C.M. 1935; R.C.M. 1947, 93-4340.

Part 2

Procedure for Obtaining Writ

27-18-201. Time for attaching property. A plaintiff, at the time of issuing the summons or at any time afterward, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered.

History: En. Sec. 890, C. Civ. Proc. 1895; re-en. Sec. 6656, Rev. C. 1907; re-en. Sec. 9256, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 537; amd. Sec. 1, Ch. 82, L. 1931; re-en. Sec. 9256, R.C.M. 1935; amd. Sec. 11-159, Ch. 264, L. 1963; amd. Sec. 1, Ch. 299, L. 1977; R.C.M. 1947, 93-4301(1).

27-18-202. Plaintiff's affidavit. When attachment of a defendant's property is sought, an affidavit must be made by the plaintiff or someone in his behalf stating:

(1) facts which show the defendant is indebted to the plaintiff in the manner specified in 27-18-101(1);
(2) that the attachment is not sought to hinder, delay, or defraud any creditor of the defendant;
(3) facts creating a reasonable belief that the defendant:
(a) is leaving or about to leave this state taking with him property, money, or other effects which might be subjected to payment of the debt;
(b) is disposing or about to dispose of his property which would be subject to execution;
(c) has the power to dispose of or conceal or remove from the state property which would be subject to execution; or
(d) is likely to suffer liens or encumbrances on his property which would be subject to execution;
(4) a particular description and the actual value of the property to be attached.

History: En. 93-4302.1 by Sec. 2, Ch. 299, L. 1977; R.C.M. 1947, 93-4302.1.

27-18-203. Affidavit requirements when debt not yet due. Actions may be commenced and writs of attachment issued upon any debt for the payment of money or specific property before the same shall have become due when it shall appear by the affidavit, in addition to what is required in 27-18-202:
(1) that the defendant is leaving or is about to leave this state, taking with him property, moneys, or other effects which might be subjected to the payment of the debt, for the purpose of defrauding his creditors; or
(2) that the defendant is disposing of his property or is about to dispose of his property, subject to execution, for the purpose of defrauding his creditors.

History: En. Sec. 1, p. 141, L. 1899; re-en. Sec. 6658, Rev. C. 1907; amd. Sec. 1, Ch. 14, L. 1911; re-en. Sec. 9258, R.C.M. 1921; re-en. Sec. 9258, R.C.M. 1935; R.C.M. 1947, 93-4303(part).

27-18-204. Plaintiff's undertaking. Before issuing the writ, the court must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties to be approved by the court, in a sum not less than double the amount claimed by the plaintiff if such amount be $1,000 or under or, in case the amount so claimed by plaintiff shall exceed $1,000, then in a sum equal to such amount. In no case shall an undertaking be required exceeding in amount the sum of $20,000. The condition of such undertaking shall be to the effect that if the defendant recovers judgment or if the court finally decides that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant and all damages he may sustain by reason of the issuing of the attachment, not exceeding the sum specified in the undertaking.

History: En. Sec. 93, p. 61, Bannack Stat.; amd. Sec. 122, p. 156, L. 1867; amd. Sec. 12, p. 65, L. 1869; amd. Sec. 7, p. 75, L. 1870; amd. Sec. 138, p. 54, Cod. Stat. 1871; amd. Sec. 20, p. 56, L. 1874; amd. Sec. 180, p. 82, L. 1877; re-en. Sec. 180, 1st Div. Rev. Stat. 1879; amd. Sec. 6, p. 9, L. 1881; re-en. Sec. 182, 1st Div. Comp. Stat. 1887; en. Sec. 892, C. Civ. Proc. 1895; re-en. Sec. 6659, Rev. C. 1907; re-en. Sec. 9259, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 539; re-en. Sec. 9259, R.C.M. 1935; amd. Sec. 1, Ch. 15, L. 1951; amd. Sec. 1, Ch. 303, L. 1967; amd. Sec. 3, Ch. 299, L. 1977; R.C.M. 1947, 93-4304(1).

27-18-205. When judge may issue writ — notice. A judge of a court having jurisdiction of the cause may issue a writ of attachment when:
(1) he has received the affidavit described in 27-18-202;
(2) he has approved the undertaking required in 27-18-204; and
(3) the party seeking attachment has made a prima facie showing:

(a) in the case of real property, of his right to attachment and the necessity for seizure;

(b) in the case of personal property:

(i) of his right to attachment and the necessity for seizure at a show cause hearing before the court with at least 3 days' notice to the defendant; if the defendant cannot be found for personal service, notice shall be posted on the property and in three public places in the county where the property is located; or

(ii) of his right to attachment and the necessity for seizure and that the delay caused by notice and a hearing would seriously impair the remedy sought by the party seeking possession. Evidence of such impairment must be presented in open court, and the court must set forth with specificity the reasons why such delay would seriously impair the remedy sought by the person seeking attachment.

History: En. 93-4304.1 by Sec. 4, Ch. 299, L. 1977; R.C.M. 1947, 93-4304.1.

27-18-206. Issuance of several writs to different counties. Several writs may be issued at the same time to the sheriffs of different counties.

History: En. Sec. 94, p. 61, Bannack Stat.; amd. Sec. 123, p. 156, L. 1867; re-en. Sec. 140, p. 55, Cod. Stat. 1871; amd. Sec. 1, p. 47, L. 1874; amd. Sec. 182, p. 83, L. 1877; re-en. Sec. 182, 1st Div. Rev. Stat. 1879; re-en. Sec. 184, 1st Div. Comp. Stat. 1887; re-en. Sec. 893, C. Civ. Proc. 1895; en. Sec. 1, p. 140, L. 1899; re-en. Sec. 6660, Rev. C. 1907; re-en. Sec. 9260, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 540; re-en. Sec. 9260, R.C.M. 1935; R.C.M. 1947, 93-4305(part).

27-18-207. Alias writs. Whenever a writ of attachment has been lost or whenever it shall appear from the sheriff's return thereof that no property of the party or parties defendant has been levied upon or that the levy made is insufficient to satisfy the full amount of the plaintiff's demand or if, for any reason, the levy of the original writ is void or ineffective, the clerk of the court, upon written demand of the plaintiff or his attorney, shall issue an alias writ in the same form as the original, but no such alias writ shall be issued in an action after the commencement of the trial thereof. No new or additional affidavit or undertaking on attachment shall be required for the issuance of an alias writ. Alias writs of attachment may be issued to the sheriffs of different counties.

History: En. Sec. 1, Ch. 121, L. 1921; re-en. Sec. 9275, R.C.M. 1921; re-en. Sec. 9275, R.C.M. 1935; R.C.M. 1947, 93-4322.

Part 3

Writ of Attachment — Execution

27-18-301. Form and content of writ — defendant's undertaking to prevent levy. The writ must be directed to the sheriff of any county in which property of such defendant may be and must require him to attach and safely keep all the property of such defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, in which case, to take such undertaking. Such undertaking is to be to the plaintiff or plaintiffs in the action and shall be approved in writing on the back thereof by the plaintiff or plaintiffs or his or their attorney or attorneys or, upon their refusal, by the judge of the district court of the same county as the residence of the sheriff.

History: En. Sec. 94, p. 61, Bannack Stat.; amd. Sec. 123, p. 156, L. 1867; re-en. Sec. 140, p. 55, Cod. Stat. 1871; amd. Sec. 1, p. 47, L. 1874; amd. Sec. 182,

p. 83, L. 1877; re-en. Sec. 182, 1st Div. Rev. Stat. 1879; re-en. Sec. 184, 1st Div. Comp. Stat. 1887; re-en. Sec. 893, C. Civ. Proc. 1895; en. Sec. 1, p. 140, L. 1899; re-en. Sec. 6660, Rev. C. 1907; re-en. Sec. 9260, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 540; re-en. Sec. 9260, R.C.M. 1935; R.C.M. 1947, 93-4305(part).

27-18-302. Filing of undertaking — sheriff's liability. The sheriff shall thereupon file said undertaking with the clerk of the district court out of which said writ of attachment emanates, and such sheriff shall thereupon cease to be liable under said writ, and any and all actions on such undertaking shall be against the obligors named in such undertaking.

History: En. Sec. 94, p. 61, Bannack Stat.; amd. Sec. 123, p. 156, L. 1867; re-en. Sec. 140, p. 55, Cod. Stat. 1871; amd. Sec. 1, p. 47, L. 1874; amd. Sec. 182, p. 83, L. 1877; re-en. Sec. 182, 1st Div. Rev. Stat. 1879; re-en. Sec. 184, 1st Div. Comp. Stat. 1887; re-en. Sec. 893, C. Civ. Proc. 1895; en. Sec. 1, p. 140, L. 1899; re-en. Sec. 6660, Rev. C. 1907; re-en. Sec. 9260, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 540; re-en. Sec. 9260, R.C.M. 1935; R.C.M. 1947, 93-4305(part).

27-18-303. Order of execution when several writs against same defendant. The sheriff must endorse upon each writ of attachment received by him the time when the same was received, specifying the day, hour, and minute. The writ of attachment first placed in the hands of the sheriff must be executed first, and when there are several writs against the same defendant, they must be executed in the order in which they were received by the sheriff.

History: En. Sec. 160, p. 59, Cod. Stat. 1871; re-en. Sec. 202, p. 89, L. 1877; re-en. Sec. 202, 1st Div. Rev. Stat. 1879; re-en. Sec. 204, 1st Div. Comp. Stat. 1887; amd. Sec. 920, C. Civ. Proc. 1895; re-en. Sec. 6687, Rev. C. 1907; re-en. Sec. 9288, R.C.M. 1921; re-en. Sec. 9288, R.C.M. 1935; R.C.M. 1947, 93-4335(part).

27-18-304. When sheriff may require written specification of property to be levied upon. No written specification of property to be levied upon must be required by the sheriff, except as to property referred to in 27-18-403 and 27-18-405(2).

History: En. Sec. 160, p. 59, Cod. Stat. 1871; re-en. Sec. 202, p. 89, L. 1877; re-en. Sec. 202, 1st Div. Rev. Stat. 1879; re-en. Sec. 204, 1st Div. Comp. Stat. 1887; amd. Sec. 920, C. Civ. Proc. 1895; re-en. Sec. 6687, Rev. C. 1907; re-en. Sec. 9288, R.C.M. 1921; re-en. Sec. 9288, R.C.M. 1935; R.C.M. 1947, 93-4335(part).

27-18-305. Security for sheriff's costs. If the sheriff will incur substantial costs in transporting, keeping, or storing the property seized, the party requesting service of a writ of attachment shall provide a bond or other security to pay for all costs which may be incurred as a result of the service of such writ.

History: En. Sec. 4393, Pol. C. 1895; re-en. Sec. 3022, Rev. C. 1907; re-en. Sec. 4786, R.C.M. 1921; Cal. Pol. C. Sec. 4185; re-en. Sec. 4786, R.C.M. 1935; amd. Sec. 1, Ch. 426, L. 1977; R.C.M. 1947, 16-2714(part).

27-18-306. Sheriff's duty to execute. The sheriff to whom the writ is directed and delivered must execute the same without delay and, if the undertaking mentioned in 27-18-301 be not given, as provided in part 4. He may levy, from time to time and as often as is necessary, until the amount for which it was issued has been secured. In no case shall the sheriff attach more property than appears necessary to satisfy the plaintiff's demand.

History: Ap. p. Sec. 96, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p. 55, Cod. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895; amd. Sec. 1, p. 139, L.

1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en. Sec. 9262, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 542; amd. Sec. 1, Ch. 71, L. 1931; re-en. Sec. 9262, R.C.M. 1935; amd. Sec. 11-161, Ch. 264, L. 1963; Sec. 93-4307, R.C.M. 1947; Ap. p. Sec. 898, C. Civ. Proc. 1895; re-en. Sec. 6665, Rev. C. 1907; re-en. Sec. 9265, R.C.M. 1921; re-en. Sec. 9265, R.C.M. 1935; Sec. 93-4312, R.C.M. 1947; Ap. p. Sec. 94, p. 61, Bannack Stat.; amd. Sec. 123, p. 156, L. 1867; re-en. Sec. 140, p. 55, Cod. Stat. 1871; amd. Sec. 1, p. 47, L. 1874; amd. Sec. 182, p. 83, L. 1877; re-en. Sec. 182, 1st Div. Rev. Stat. 1879; re-en. Sec. 184, 1st Div. Comp. Stat. 1887; re-en. Sec. 893, C. Civ. Proc. 1895; en. Sec. 1, p. 140, L. 1899; re-en. Sec. 6660, Rev. C. 1907; re-en. Sec. 9260, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 540; re-en. Sec. 9260, R.C.M. 1935; R.C.M. 1947, 93-4305(part), 93-4307(part), 93-4312(part).

27-18-307. Lien of attachment. All liens by attachment shall accrue at the time the property of the defendant shall be attached by the officer charged with the execution of the writ, in the order in which the writs are levied, and said lien shall not be affected by any subsequent attachment or by any judgment obtained subsequent thereto.

History: En. Sec. 160, p. 59, Cod. Stat. 1871; re-en. Sec. 202, p. 89, L. 1877; re-en. Sec. 202, 1st Div. Rev. Stat. 1879; re-en. Sec. 204, 1st Div. Comp. Stat. 1887; amd. Sec. 920, C. Civ. Proc. 1895; re-en. Sec. 6687, Rev. C. 1907; re-en. Sec. 9288, R.C.M. 1921; re-en. Sec. 9288, R.C.M. 1935; R.C.M. 1947, 93-4335(part).

27-18-308. Attachment not released by defendant's death. The death of the defendant does not release the attached property, and a lien of the attachment may be enforced as in the case of other liens.

History: En. Sec. 907, C. Civ. Proc. 1895; re-en. Sec. 6674, Rev. C. 1907; re-en. Sec. 9274, R.C.M. 1921; re-en. Sec. 9274, R.C.M. 1935; R.C.M. 1947, 93-4321.

Part 4

Manner of Attaching Property

27-18-401. Sheriff to take custody of books and evidences of title. The sheriff must take into his custody all books of account, vouchers, and other papers relating to the personal property attached and all evidences of the defendant's title to the real property attached, which he must safely keep.

History: En. Sec. 898, C. Civ. Proc. 1895; re-en. Sec. 6665, Rev. C. 1907; re-en. Sec. 9265, R.C.M. 1921; re-en. Sec. 9265, R.C.M. 1935; R.C.M. 1947, 93-4312(part).

27-18-402. Real property in defendant's name. Real property standing upon the records of the county in the name of the defendant must be attached by filing with the county clerk a copy of the writ, together with the description of the property attached and a notice that it is attached.

History: En. Sec. 96, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p. 55, Cod. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895; amd. Sec. 1, p. 139, L. 1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en. Sec. 9262, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 542; amd. Sec. 1, Ch. 71, L. 1931; re-en. Sec. 9262, R.C.M. 1935; amd. Sec. 11-161, Ch. 264, L. 1963; R.C.M. 1947, 93-4307(1).

27-18-403. Real property in another's name. Real property or an interest therein belonging to the defendant and held by any other person or standing on the records of the county in the name of any other person must be attached by filing with the county clerk a copy of the writ, together with a description of the property and a notice that such real property and any interest of the defendant therein, held by or standing in the name of such other person (naming him), are attached. The county clerk must index such attachment when filed in the names both of the defendant and of the person by whom the property is held or in whose name it stands on the record.

History: En. Sec. 96, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p. 55, Cod. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895; amd. Sec. 1, p. 139, L. 1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en. Sec. 9262, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 542; amd. Sec. 1, Ch. 71, L. 1931; re-en. Sec. 9262, R.C.M. 1935; amd. Sec. 11-161, Ch. 264, L. 1963; R.C.M. 1947, 93-4307(2).

27-18-404. Personal property capable of manual delivery. Personal property capable of manual delivery must be attached by taking it into custody, except in cases in which personal property capable of manual delivery is in the possession of a third person, and such personal property, so in the possession of a third person, may be attached in the same manner as debts or credits and other personal property not capable of manual delivery, as hereinafter provided.

History: En. Sec. 96, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p. 55, Cod. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895; amd. Sec. 1, p. 139, L. 1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en. Sec. 9262, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 542; amd. Sec. 1, Ch. 71, L. 1931; re-en. Sec. 9262, R.C.M. 1935; amd. Sec. 11-161, Ch. 264, L. 1963; R.C.M. 1947, 93-4307(3).

27-18-405. Debts, credits, and personal property in control of third person or not capable of manual delivery. (1) Debts or credits and personal property not capable of manual delivery and personal property in the possession of a third person must be attached by leaving with the person owing such debt or having in his possession or under his control such credits and personal property or with his agent a copy of the writ and a notice that the debts owing by him to the defendant or the credits and other personal property in his possession or under his control, belonging to the defendant, are attached in pursuance of such writ.

(2) Upon receiving information in writing from the plaintiff or his attorney that any person has in his possession or under his control any credits or other personal property belonging to the defendant or is owing any debt to the defendant, the sheriff must serve upon such person a copy of the writ and a notice that such credits or other property or debts, as the case may be, are attached in pursuance of said writ.

(3) Debts and credits attached may be collected by the sheriff if the same can be done without suit. The sheriff's receipt is a sufficient discharge for the amount paid.

History: (1)En. Sec. 96, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p. 55, Cod. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895; amd. Sec. 1, p. 139, L. 1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en. Sec. 9262, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 542; amd. Sec. 1, Ch. 71, L. 1931; re-en. Sec. 9262, R.C.M. 1935; amd. Sec. 11-161, Ch. 264, L. 1963; Sec. 93-4307, R.C.M. 1947; (2)En. Sec. 97, p. 62, Bannack Stat.; re-en. Sec. 126, p. 157, L. 1867; re-en. Sec. 144, p. 56, Cod. Stat. 1871; re-en. Sec. 186, p. 85, L. 1877; re-en. Sec. 186, 1st Div. Rev. Stat. 1879; re-en. Sec. 188, 1st Div. Comp. Stat. 1887; re-en. Sec.

899, C. Civ. Proc. 1895; re-en. Sec. 6666, Rev. C. 1907; re-en. Sec. 9266, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 543; re-en. Sec. 9266, R.C.M. 1935; Sec. 93-4313, R.C.M. 1947; (3)En. Sec. 101, p. 63, Bannack Stat.; re-en. Sec. 130, p. 158, L. 1867; re-en. Sec. 148, p. 57, Cod. Stat. 1871; re-en. Sec. 190, p. 86, L. 1877; re-en. Sec. 190, 1st Div. Rev. Stat. 1879; re-en. Sec. 192, 1st Div. Comp. Stat. 1887; re-en. Sec. 903, C. Civ. Proc. 1895; re-en. Sec. 6670, Rev. C. 1907; re-en. Sec. 9270, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 547; re-en. Sec. 9270, R.C.M. 1935; Sec. 93-4317, R.C.M. 1947; R.C.M. 1947, 93-4307(5), 93-4313, 93-4317(part).

27-18-406. Money, credits, or other property in control of public officer or board. Money, credits, or other property belonging to or due and owing to another, in the possession of or under the control of a public officer or board, including all officers or boards of a county, municipal corporation, and school district or state board or state government, may be attached or garnished while in such possession or under such control by making service, as provided in this part, upon the clerk of the county or chairman of the board of county commissioners, the city clerk or mayor of a municipal corporation, or the clerk of the board of school trustees or chairman of such board, as the case may be.

History: En. Sec. 1, p. 159, L. 1901; re-en. Sec. 6692, Rev. C. 1907; re-en. Sec. 9294, R.C.M. 1921; re-en. Sec. 9294, R.C.M. 1935; R.C.M. 1947, 93-4341.

27-18-407. Liability of third persons controlling property or debts and served by sheriff. All persons having in their possession or under their control any credits or other personal property belonging to the defendant or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice shall be, unless such property be delivered up or transferred or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts until the attachment be discharged or any judgment recovered by him be satisfied.

History: En. Sec. 98, p. 62, Bannack Stat.; re-en. Sec. 127, p. 157, L. 1867; re-en. Sec. 145, p. 56, Cod. Stat. 1871; re-en. Sec. 187, p. 85, L. 1877; re-en. Sec. 187, 1st Div. Rev. Stat. 1879; re-en. Sec. 189, 1st Div. Comp. Stat. 1887; re-en. Sec. 900, C. Civ. Proc. 1895; re-en. Sec. 6667, Rev. C. 1907; re-en. Sec. 9267, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 544; re-en. Sec. 9267, R.C.M. 1935; R.C.M. 1947, 93-4314.

27-18-408. Judgments. Judgments standing in favor of and in the name of the defendant upon the records of the clerk of the district court must be attached by leaving with the said clerk of the district court a copy of the writ and a notice stating that the said judgment is attached in pursuance of such writ. The clerk of the district court must index and keep a record of all attachments of judgments thereunder, and such attachment is binding on the judgment creditor.

History: En. Sec. 96, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p. 55, Cod. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895; amd. Sec. 1, p. 139, L. 1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en. Sec. 9262, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 542; amd. Sec. 1, Ch. 71, L. 1931; re-en. Sec. 9262, R.C.M. 1935; amd. Sec. 11-161, Ch. 264, L. 1963; R.C.M. 1947, 93-4307(6).

27-18-409. Investment securities and stocks. Investment securities, as defined in the Uniform Commercial Code, may be attached or levied upon only by seizure by the officer making the attachment or levy; provided that such a security which has been surrendered to the issuer may be attached or levied upon by leaving with the president or other head of the same or the secretary, cashier, or other managing agent thereof a copy of the writ and a notice stating that the security of the defendant is attached in pursuance of such writ. Stocks or shares or interest in stocks or shares of any corporation or company, other than such investment securities, may be attached either by seizure or by leaving with the president or other head of the same or the secretary, cashier, or other managing agent thereof a copy of the writ and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ.

History: En. Sec. 96, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p. 55, Cod. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895; amd. Sec. 1, p. 139, L. 1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en. Sec. 9262, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 542; amd. Sec. 1, Ch. 71, L. 1931; re-en. Sec. 9262, R.C.M. 1935; amd. Sec. 11-161, Ch. 264, L. 1963; R.C.M. 1947, 93-4307(4).

27-18-410. Corporate stock — service on secretary of state. In addition to the method prescribed in 27-18-409 for attaching stocks or shares or interest therein of any corporation or company, if the president or other head of the same or the secretary, cashier, or other managing agent thereof does not live in Montana or cannot be found within the said state and an affidavit is filed in the office of the clerk of the court in which the action is pending setting forth that the above-named officers or managing agent of said corporation does not live or cannot be found within the state, the clerk of the court shall make an order directing the writ to be served upon the secretary of state of Montana or, in his absence from his office, upon the deputy secretary of state. When such order has been made, the writ of attachment shall be served upon the secretary of state or, in his absence, upon the deputy secretary of state by leaving with him a copy of said writ and a notice that the stock or interest therein of the defendant is attached in pursuance of such writ.

History: En. Sec. 1, Ch. 128, L. 1937; R.C.M. 1947, 93-4308.

27-18-411. Duty of secretary of state — fees. (1) Upon such service being so made upon the secretary of state or his deputy, the secretary of state or his deputy shall promptly mail the copy of the writ, notice, and copy of said order by registered or certified mail to the address of such corporation at its principal home office, as shown by the papers on file in the office of secretary of state, and shall make out and mail to the clerk of the court in which the action is pending a certificate of such mailing, which shall have attached thereto the registry receipt for such letter, that such attachment so made upon the secretary of state as herein provided shall be effective and the said stock or shares or the interest therein of the defendant shall be attached upon the service of the writ, as herein provided.

(2) At the time of the service of said writ, there shall be paid to the secretary of state a fee of $2, which shall be by him paid into the state treasury and which may be taxed as cost by the plaintiff.

History: En. Sec. 2, Ch. 128, L. 1937; R.C.M. 1947, 93-4309.

27-18-412. Interest of defendant in decedent's estate. The interest of a defendant in personal property belonging to the estate of a decedent, whether as heir, legatee, or devisee, may be attached by serving the personal representative of the decedent with a copy of the writ and a notice that said interest is attached. Such attachment shall not impair the powers of the representative over the property for the purposes of administration. A copy of said writ of attachment and of said notice shall also be filed in the office of the clerk of the court in which said estate is being administered, and the personal representative shall report such attachment to the court when any petition for distribution is filed; and in the decree made upon such petition, distribution shall be ordered to such heir, legatee, or devisee, but delivery of such property shall be ordered to the officer making the levy, subject to the claim of such heir, legatee, or devisee or any person claiming under him. The property shall not be delivered to the officer making the levy until the decree distributing such interest has become final.

History: En. Sec. 96, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p. 55, Cod. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895; amd. Sec. 1, p. 139, L. 1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en. Sec. 9262, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 542; amd. Sec. 1, Ch. 71, L. 1931; re-en. Sec. 9262, R.C.M. 1935; amd. Sec. 11-161, Ch. 264, L. 1963; R.C.M. 1947, 93-4307(7).

27-18-413. Personal property subject to a security interest. Personal property subject to a security interest may be taken on attachment issued at the suit of a creditor of the debtor under the security agreement; but before the property is so taken, the officer levying the writ must pay or tender to the secured party the amount of the security agreement debt and interest or must deposit the same with the county treasurer of the county in which the financing statement covering the security agreement is filed, if such statement is filed with a county clerk and recorder, or if such statement is filed with another filing officer pursuant to law, then with such other filing officer, payable to the order of the secured party.

History: En. Sec. 1, Ch. 111, L. 1921; re-en. Sec. 9291, R.C.M. 1921; re-en. Sec. 9291, R.C.M. 1935; amd. Sec. 11-162, Ch. 264, L. 1963; R.C.M. 1947, 93-4338(part).

27-18-414. Duty of secured party. (1) The secured party under any security agreement of record shall, upon 15 days' notice in writing served upon him in person by any creditor of the debtor seeking to satisfy a demand of such creditor against the debtor, be required to make and file in the office of the county clerk and recorder or other filing officer with whom the financing statement covering the security agreement is filed an affidavit showing the amount of the indebtedness then actually due and owing to the secured party; and such affidavit shall state the amount of the original obligation for which the security agreement was given as security, all additional advancement of money or property on the principal obligation since the date of the execution of the security agreement, all payments of whatsoever kind, whether on principal or interest, made by the debtor to the date of the execution of such affidavit by the secured party, and the balance then remaining due and unpaid to the secured party. If, within 15 days from the service of any such demand in writing on the secured party by any creditor of the debtor, the secured party shall fail, refuse, or neglect to file the affidavit herein required, the security agreement shall be of no force or effect as against such creditor upon the seizure of any such personal property on attachment.

(2) In the event the amount shown to be due is paid to the county treasurer or to a filing officer, as aforesaid, or to the secured party in satisfaction of the security agreement by any attaching creditor against the debtor, the secured party shall be required to surrender to the county treasurer or such filing officer the security agreement and any note or other evidence of indebtedness secured thereby, which security agreement or other evidence of indebtedness shall be delivered by the secured party, county treasurer, or filing officer to the attaching creditor.

History: En. Sec. 1, Ch. 111, L. 1921; re-en. Sec. 9291, R.C.M. 1921; re-en. Sec. 9291, R.C.M. 1935; amd. Sec. 11-162, Ch. 264, L. 1963; R.C.M. 1947, 93-4338(part).

Part 5

Proceedings in Aid of Attachment

27-18-501. Examination under oath of defendant or person controlling property or debts — order that property be delivered. Any person owing debts to the defendant or having in his possession or under his control any credits or other personal property belonging to the defendant may be required to attend before the court or judge or referee appointed by the court or judge and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property and may be examined on oath. The court or judge may, after such examination, order personal property capable of manual delivery in the hands or under the control of such person or of the defendant to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

History: En. Sec. 99, p. 62, Bannack Stat.; re-en. Sec. 128, p. 158, L. 1867; re-en. Sec. 146, p. 56, Cod. Stat. 1871; re-en. Sec. 188, p. 86, L. 1877; re-en. Sec. 188, 1st Div. Rev. Stat. 1879; re-en. Sec. 190, 1st Div. Comp. Stat. 1887; re-en. Sec. 901, C. Civ. Proc. 1895; re-en. Sec. 6668, Rev. C. 1907; re-en. Sec. 9268, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 545; re-en. Sec. 9268, R.C.M. 1935; R.C.M. 1947, 93-4315.

27-18-502. Person holding property to give sheriff certificate of defendant's interest. Upon the application of a sheriff holding a writ of attachment, the president or other head of an association or corporation or the secretary, cashier, or managing agent thereof or a debtor of the defendant or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant must furnish to the sheriff a certificate, under his hand, specifying his right to a number of shares of the defendant in the stock of the association or corporation, with all dividends declared or encumbrances thereon, or the amount, nature, and description of the property held for the benefit of the defendant or of the defendant's interest in property so held or of the debt or demand owing to the defendant, as the case requires.

History: En. Sec. 896, C. Civ. Proc. 1895; re-en. Sec. 6663, Rev. C. 1907; re-en. Sec. 9263, R.C.M. 1921; re-en. Sec. 9263, R.C.M. 1935; R.C.M. 1947, 93-4310.

27-18-503. Order to person holding property to submit to examination under oath. If a person to whom application is made, as prescribed in 27-18-502, refuses to give such certificate or if it is made to appear, by affidavit, to the satisfaction of the court or a judge thereof, that there is reason to suspect that a certificate given by him is untrue or that it failed fully to set forth the facts required to be shown thereby, the court or judge may make an order directing him to attend, at a specified time and at a place within the county to which the writ is issued, and submit to an examination under oath concerning the same. The order may, in the discretion of the court or judge, direct an appearance before a referee named therein.

History: En. Sec. 897, C. Civ. Proc. 1895; re-en. Sec. 6664, Rev. C. 1907; re-en. Sec. 9264, R.C.M. 1921; re-en. Sec. 9264, R.C.M. 1935; R.C.M. 1947, 93-4311.

Part 6

Procedure Following Attachment — Return of Writ

27-18-601. Sheriff to retain nonperishable attached property and proceeds of sales. The proceeds and other property attached by the sheriff must be retained by him to answer any judgment that may be recovered in the action unless sooner subjected to execution upon another judgment recovered previous to the issuing of the attachment.

History: En. Sec. 101, p. 63, Bannack Stat.; re-en. Sec. 130, p. 158, L. 1867; re-en. Sec. 148, p. 57, Cod. Stat. 1871; re-en. Sec. 190, p. 86, L. 1877; re-en. Sec. 190, 1st Div. Rev. Stat. 1879; re-en. Sec. 192, 1st Div. Comp. Stat. 1887; re-en. Sec. 903, C. Civ. Proc. 1895; re-en. Sec. 6670, Rev. C. 1907; re-en. Sec. 9270, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 547; re-en. Sec. 9270, R.C.M. 1935; R.C.M. 1947, 93-4317(part).

27-18-602. Claim of attached property by third person — plaintiff to indemnify sheriff. If personal property attached be claimed by a third person, he shall give notice thereof to the sheriff and deliver to him an affidavit, stating his claim, ownership, and a description of the property; and unless the plaintiff, within 10 days after receiving notice thereof, give the sheriff a good and sufficient bond to indemnify him against loss or damage by reason of such retaining said property, the sheriff shall deliver the same to such person.

History: En. Sec. 149, p. 57, Cod. Stat. 1871; re-en. Sec. 191, p. 87, L. 1877; re-en. Sec. 191, 1st Div. Rev. Stat. 1879; re-en. Sec. 193, 1st Div. Comp. Stat. 1887; en. Sec. 906, C. Civ. Proc. 1895; re-en. Sec. 6673, Rev. C. 1907; re-en. Sec. 9273, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 549; re-en. Sec. 9273, R.C.M. 1935; R.C.M. 1947, 93-4320.

27-18-603. Sheriff's inventory of attached property — cooperation of persons controlling credits or debts. (1) The sheriff must make a full inventory of the property attached and return the same with the writ. When the sheriff has levied several writs of attachment on the same property, only one inventory must be made.

(2) To enable him to make such return as to debts and credits attached, he must request, at the time of service, the person owing the debt or having the credit to give him the memorandum, stating the amount and description of each; and if such memorandum be refused, the sheriff may apply upon 1 day's notice to the court or judge for an order to compel such memorandum to be given. If the order be granted, it shall also direct the payment of costs of the motion by the person refusing.

History: En. Sec. 100, p. 63, Bannack Stat.; amd. Sec. 129, p. 158, L. 1867; re-en. Sec. 147, p. 57, Cod. Stat. 1871; re-en. Sec. 189, p. 86, L. 1877; re-en. Sec. 189, 1st Div. Rev. Stat. 1879; re-en. Sec. 191, 1st Div. Comp. Stat. 1887; re-en. Sec. 902, C. Civ. Proc. 1895; re-en. Sec. 6669, Rev. C. 1907; re-en. Sec. 9269, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 546; re-en. Sec. 9269, R.C.M. 1935; R.C.M. 1947, 93-4316.

27-18-604. Sheriff's return of writ. The sheriff must return the writ of attachment with the summons if issued at the same time, otherwise, within 20 days after its receipt, with a certificate of his proceedings endorsed thereon or attached thereto.

History: En. Sec. 114, p. 66, Bannack Stat.; re-en. Sec. 141, p. 160, L. 1867; re-en. Sec. 159, p. 59, Cod. Stat. 1871; re-en. Sec. 201, p. 89, L. 1877; re-en. Sec. 201, 1st Div. Rev. Stat. 1879; re-en. Sec. 203, 1st Div. Comp. Stat. 1887; amd. Sec. 919, C. Civ. Proc. 1895; re-en. Sec. 6686, Rev. C. 1907; re-en. Sec. 9287, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 559; re-en. Sec. 9287, R.C.M. 1935; R.C.M. 1947, 93-4334(part).

Part 7

Methods of Defending Against Attachment

27-18-701. Right to hearing following seizure without notice — notice of right. When a writ has been issued upon real property or upon the showing specified in 27-18-205(3)(b)(ii), the defendant may challenge the seizure of the property at a hearing before the court to be held within 3 days after the seizure. Notice of the right to a postseizure hearing shall be served personally on the defendant, or if the defendant cannot be found for personal service, notice shall be posted on the property and in three public places in the county where the property is located.

History: En. 93-4304.2 by Sec. 5, Ch. 299, L. 1977; R.C.M. 1947, 93-4304.2(1).

27-18-702. When writ quashed. At such hearing the defendant may challenge the merit of the underlying action, the need for the prejudgment seizure of property, or both. The writ shall be quashed if the court makes a preliminary finding that:

(1) the plaintiff cannot establish the prima facie validity of his claim; or

(2) the plaintiff cannot establish by a preponderance of the evidence the need for the continued attachment of the defendant's property.

History: En. 93-4304.2 by Sec. 5, Ch. 299, L. 1977; R.C.M. 1947, 93-4304.2(2).

27-18-703 through 27-18-710 reserved.

27-18-711. Motion to discharge writ improperly issued. The defendant may also, at any time either before or after the release of the attached property or before any attachment shall have been actually levied, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought or to a judge thereof that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued.

History: En. Sec. 138, p. 160, L. 1867; re-en. Sec. 156, p. 59, Cod. Stat. 1871; amd. Sec. 1, p. 48, L. 1874; amd. Sec. 198, p. 89, L. 1877; re-en. Sec. 198, 1st Div. Rev. Stat. 1879; re-en. Sec. 200, 1st Div. Comp. Stat. 1887; en. Sec. 914, C. Civ. Proc. 1895; re-en. Sec. 6681, Rev. C. 1907; re-en. Sec. 9282, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 556; re-en. Sec. 9282, R.C.M. 1935; R.C.M. 1947, 93-4329.

27-18-712. Use of affidavits to support or oppose motion. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to those on which the attachment was made.

History: En. Sec. 139, p. 160, L. 1867; re-en. Sec. 157, p. 59, Cod. Stat. 1871; re-en. Sec. 199, p. 89, L. 1877; re-en. Sec. 199, 1st Div. Rev. Stat. 1879; re-en. Sec. 201, 1st Div. Comp. Stat. 1887; re-en. Sec. 915, C. Civ. Proc. 1895; re-en. Sec. 6682, Rev. C. 1907; re-en. Sec. 9283, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 557; re-en. Sec. 9283, R.C.M. 1935; R.C.M. 1947, 93-4330.

27-18-713. Decision of court. If upon such application it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged. But the court or judge may allow the plaintiff to amend his affidavit or undertaking.

History: En. Sec. 140, p. 160, L. 1867; re-en. Sec. 158, p. 59, Cod. Stat. 1871; re-en. Sec. 200, p. 89, L. 1877; re-en. Sec. 200, 1st Div. Rev. Stat. 1879; re-en. Sec. 202, 1st Div. Comp. Stat. 1887; amd. Sec. 916, C. Civ. Proc. 1895; re-en. Sec.

6683, Rev. C. 1907; re-en. Sec. 9284, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 558; re-en. Sec. 9284, R.C.M. 1935; R.C.M. 1947, 93-4331.

27-18-714 reserved.

27-18-715. Exception to plaintiff's sureties. At any time within 30 days after the service of summons, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them.

History: En. Sec. 93, p. 61, Bannack Stat.; amd. Sec. 122, p. 156, L. 1867; amd. Sec. 12, p. 65, L. 1869; amd. Sec. 7, p. 75, L. 1870; amd. Sec. 138, p. 54, Cod. Stat. 1871; amd. Sec. 20, p. 56, L. 1874; amd. Sec. 180, p. 82, L. 1877; re-en. Sec. 180, 1st Div. Rev. Stat. 1879; amd. Sec. 6, p. 9, L. 1881; re-en. Sec. 182, 1st Div. Comp. Stat. 1887; en. Sec. 892, C. Civ. Proc. 1895; re-en. Sec. 6659, Rev. C. 1907; re-en. Sec. 9259, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 539; re-en. Sec. 9259, R.C.M. 1935; amd. Sec. 1, Ch. 15, L. 1951; amd. Sec. 1, Ch. 303, L. 1967; amd. Sec. 3, Ch. 299, L. 1977; R.C.M. 1947, 93-4304(2).

27-18-716. Justification of sureties. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than 2 days or more than 10 days, must justify before a judge of the district court, and upon failure to justify or if others in their place fail to justify at the time and place appointed, the judge shall issue an order vacating the writ of attachment.

History: En. Sec. 93, p. 61, Bannack Stat.; amd. Sec. 122, p. 156, L. 1867; amd. Sec. 12, p. 65, L. 1869; amd. Sec. 7, p. 75, L. 1870; amd. Sec. 138, p. 54, Cod. Stat. 1871; amd. Sec. 20, p. 56, L. 1874; amd. Sec. 180, p. 82, L. 1877; re-en. Sec. 180, 1st Div. Rev. Stat. 1879; amd. Sec. 6, p. 9, L. 1881; re-en. Sec. 182, 1st Div. Comp. Stat. 1887; en. Sec. 892, C. Civ. Proc. 1895; re-en. Sec. 6659, Rev. C. 1907; re-en. Sec. 9259, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 539; re-en. Sec. 9259, R.C.M. 1935; amd. Sec. 1, Ch. 15, L. 1951; amd. Sec. 1, Ch. 303, L. 1967; amd. Sec. 3, Ch. 299, L. 1977; R.C.M. 1947, 93-4304(3).

27-18-717 through 27-18-720 reserved.

27-18-721. Proceedings to release attachment. Whenever the defendant has appeared in the action, he may, upon reasonable notice to the plaintiff, apply to the court in which the action is pending or to the judge thereof for an order to discharge the attachment, wholly or in part; and upon the execution of the undertaking mentioned in 27-18-722, an order may be made releasing from the operation of the attachment any or all of the property attached; and all of the property so released and all of the proceeds of the sale thereof must be delivered to the defendant upon the justification of the sureties on the undertaking, if required by the plaintiff.

History: En. Sec. 108, p. 65, Bannack Stat.; re-en. Sec. 136, p. 159, L. 1867; amd. Sec. 154, p. 58, Cod. Stat. 1871; re-en. Sec. 196, p. 88, L. 1877; re-en. Sec. 196, 1st Div. Rev. Stat. 1879; re-en. Sec. 198, 1st Div. Comp. Stat. 1887; amd. Sec. 912, C. Civ. Proc. 1895; re-en. Sec. 6679, Rev. C. 1907; re-en. Sec. 9280, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 554; re-en. Sec. 9280, R.C.M. 1935; R.C.M. 1947, 93-4327.

27-18-722. Defendant's undertaking — justification of sureties. Before making such order, the court or judge must require an undertaking on behalf of the defendant, by at least two sureties, residents and freeholders or householders in the state, to the effect that in case the plaintiff recover judgment in the action, the defendant will, on demand, redeliver the attached property so released to the proper officer to be applied to the payment of the judgment or, in default thereof, that the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released. The court or judge making the order may fix the sum for which the undertaking shall be executed, and if necessary in fixing such sum to know the value of the property released, the same may be appraised by one or more disinterested persons to be appointed for that purpose. The sureties may be required to justify before the court or judge, and the property attached cannot be released without their justification, if the same be required.

History: En. Sec. 109, p. 65, Bannack Stat.; en. Sec. 137, p. 159, L. 1867; amd. Sec. 2, p. 67, L. 1869; re-en. Sec. 155, p. 58, Cod. Stat. 1871; amd. Sec. 1, p. 48, L. 1874; amd. Sec. 197, p. 88, L. 1877; re-en. Sec. 197, 1st Div. Rev. Stat. 1879; re-en. Sec. 199, 1st Div. Comp. Stat. 1887; amd. Sec. 913, C. Civ. Proc. 1895; re-en. Sec. 6680, Rev. C. 1907; re-en. Sec. 9281, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 555; re-en. Sec. 9281, R.C.M. 1935; R.C.M. 1947, 93-4328.

27-18-723 and 27-18-724 reserved.

27-18-725. Motion to vacate or modify writ or increase security. The defendant or a person who has acquired a lien upon or interest in his property after it was attached may, at any time before the actual application of the attached property or the proceeds thereof to the payment of a judgment recovered in the action, apply to vacate or modify the writ of attachment or to increase the security given by the plaintiff or for one or more of those forms of release together or in the alternative.

History: En. Sec. 917, C. Civ. Proc. 1895; re-en. Sec. 6684, Rev. C. 1907; re-en. Sec. 9285, R.C.M. 1921; re-en. Sec. 9285, R.C.M. 1935; R.C.M. 1947, 93-4332.

27-18-726. Proceedings on motion. An application specified in 27-18-725 may be founded only upon:

(1) the papers upon which the writ was granted, in which case it must be made to the court or judge, with or without notice as the court or judge deems proper; or

(2) proof by affidavits on the part of the defendant or a person who has acquired a lien upon or interest in his property after it was attached, in which case it must be made to the court or judge upon notice and may be opposed by new proof, by affidavit or other evidence on the part of the plaintiff, tending to sustain any grounds of attachment.

History: En. Sec. 918, C. Civ. Proc. 1895; re-en. Sec. 6685, Rev. C. 1907; re-en. Sec. 9286, R.C.M. 1921; re-en. Sec. 9286, R.C.M. 1935; R.C.M. 1947, 93-4333.

27-18-727 through 27-18-730 reserved.

27-18-731. Filing of order discharging or releasing attachment of real property. Whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order must be filed in the office of the county clerk in which the notice of the attachment has been filed and be indexed in like manner.

History: En. Sec. 114, p. 66, Bannack Stat.; re-en. Sec. 141, p. 160, L. 1867; re-en. Sec. 159, p. 59, Cod. Stat. 1871; re-en. Sec. 201, p. 89, L. 1877; re-en. Sec. 201, 1st Div. Rev. Stat. 1879; re-en. Sec. 203, 1st Div. Comp. Stat. 1887; amd. Sec. 919, C. Civ. Proc. 1895; re-en. Sec. 6686, Rev. C. 1907; re-en. Sec. 9287, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 559; re-en. Sec. 9287, R.C.M. 1935; R.C.M. 1947, 93-4334(part).

27-18-732. Release of attachment of real property by clerk when action not prosecuted — filing. If a writ of attachment has been levied on real property, as provided in part 4, and no proceedings have been taken in the action in which the attachment was issued for a period of 5 years, the clerk of court shall, upon application of the defendant or the record owner of such real property, issue a release of the attachment and a copy of such release shall be filed with the county clerk where the writ of attachment and notice thereof is filed and the county clerk shall file and index such release as any other releases of attachment.

History: En. Sec. 1, Ch. 97, L. 1965; R.C.M. 1947, 93-4331.1.

Part 8

Sale of Attached Property

27-18-801. Sheriff to sell perishable property. If any of the property attached be perishable, the sheriff must sell the same in the manner in which such property is sold on execution.

History: En. Sec. 101, p. 63, Bannack Stat.; re-en. Sec. 130, p. 158, L. 1867; re-en. Sec. 148, p. 57, Cod. Stat. 1871; re-en. Sec. 190, p. 86, L. 1877; re-en. Sec. 190, 1st Div. Rev. Stat. 1879; re-en. Sec. 192, 1st Div. Comp. Stat. 1887; re-en. Sec. 903, C. Civ. Proc. 1895; re-en. Sec. 6670, Rev. C. 1907; re-en. Sec. 9270, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 547; re-en. Sec. 9270, R.C.M. 1935; R.C.M. 1947, 93-4317(part).

27-18-802. Authority of court to order sale of property. Whenever property has been taken by an officer under a writ of attachment and it is made to appear satisfactorily to the court or a judge thereof that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution and the proceeds to be deposited in the court to abide the judgment in the action.

History: En. Sec. 437, p. 132, Bannack Stat.; re-en. Sec. 594, p. 157, Cod. Stat. 1871; re-en. Sec. 524, p. 177, L. 1877; re-en. Sec. 524, 1st Div. Rev. Stat. 1879; re-en. Sec. 541, 1st Div. Comp. Stat. 1887; amd. Sec. 904, C. Civ. Proc. 1895; re-en. Sec. 6671, Rev. C. 1907; re-en. Sec. 9271, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 548; re-en. Sec. 9271, R.C.M. 1935; R.C.M. 1947, 93-4318.

27-18-803. Notice of application for order to sell. Application for the order shall be upon such notice to the adverse party or his attorney as the court or judge, considering the nature and condition of the property, may direct. If it shall appear to the court or judge that the delay necessary to give notice would cause a material depreciation in the value of property, the order may be made without notice.

History: En. Sec. 905, C. Civ. Proc. 1895; re-en. Sec. 6672, Rev. C. 1907; re-en. Sec. 9272, R.C.M. 1921; re-en. Sec. 9272, R.C.M. 1935; R.C.M. 1947, 93-4319.

27-18-804. Sale of property subject to a security interest — disposition of proceeds, security agreement. (1) When the property taken under 27-18-413 is sold under process, the officer levying the writ must apply the proceeds of the sale as follows:

(a) to the repayment of the sum paid to the secured party, with interest from the date of such payment; and

(b) the balance, if any, in like manner as the proceeds of sales under execution are applied in other cases.

(2) In the event the property is sold under attachment, such attaching creditor shall be required to deliver to the debtor the security agreement and any note or other evidence of indebtedness secured thereby obtained from the secured party

when the property is sold for the amount of the indebtedness under the security agreement or an amount in excess thereof.

History: En. Sec. 1, Ch. 111, L. 1921; re-en. Sec. 9291, R.C.M. 1921; re-en. Sec. 9291, R.C.M. 1935; amd. Sec. 11-162, Ch. 264, L. 1963; R.C.M. 1947, 93-4338(part).

Part 9

Judgment and Subsequent Procedure

27-18-901. Judgment when debt not yet due. (1) On the trial of any cause brought under the provisions of 27-18-203, judgment may be rendered on any such debt not due upon satisfactory proof to the court of the facts alleged in the affidavit for attachment, as provided in that section. Any such judgment shall be with a rebatement of the interest from the time said judgment is rendered until the time at which said debt shall have become due.

(2) The defendant may, by plea, put in issue the matter alleged in the affidavit required in 27-18-203, and if the plaintiff fails to substantiate some one of the causes required to be alleged in said affidavit, the suit for debt or debts not due shall abate.

History: En. Sec. 1, p. 141, L. 1899; re-en. Sec. 6658, Rev. C. 1907; amd. Sec. 1, Ch. 14, L. 1911; re-en. Sec. 9258, R.C.M. 1921; re-en. Sec. 9258, R.C.M. 1935; R.C.M. 1947, 93-4303(part).

27-18-902. Procedure when defendant recovers judgment. If the defendant recover judgment against the plaintiff, any undertaking received in the action, all of the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands must be delivered to the defendant or his agent; the order of attachment shall be discharged and the property released therefrom.

History: En. Sec. 106, p. 64, Bannack Stat.; re-en. Sec. 135, p. 159, L. 1867; re-en. Sec. 153, p. 58, Cod. Stat. 1871; re-en. Sec. 195, p. 88, L. 1877; re-en. Sec. 195, 1st Div. Rev. Stat. 1879; re-en. Sec. 197, 1st Div. Comp. Stat. 1887; re-en. Sec. 911, C. Civ. Proc. 1895; re-en. Sec. 6678, Rev. C. 1907; re-en. Sec. 9279, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 553; re-en. Sec. 9279, R.C.M. 1935; R.C.M. 1947, 93-4326.

27-18-903. Judgment for plaintiff — disposition of attached property and proceeds of sales. If judgment be recovered by plaintiff, the sheriff must satisfy the same out of the property attached by him which has not been delivered to the defendant or claimant, as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose:

(1) by paying to the plaintiff the proceeds of all sales of perishable property or property ordered by the court or judge to be sold by him, or of any debts or credits collected by him, or so much thereof as shall be necessary to satisfy the judgment;

(2) if any balance remain due and an execution shall have been issued on the judgment, by selling under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales must be given and the sales conducted as in other cases of sales on execution.

History: En. Sec. 103, p. 64, Bannack Stat.; re-en. Sec. 132, p. 159, L. 1867; re-en. Sec. 150, p. 58, Cod. Stat. 1871; re-en. Sec. 192, p. 87, L. 1877; re-en. Sec. 192, 1st Div. Rev. Stat. 1879; re-en. Sec. 194, 1st Div. Comp. Stat. 1887; re-en.

Sec. 908, C. Civ. Proc. 1895; re-en. Sec. 6675, Rev. C. 1907; re-en. Sec. 9276, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 550; re-en. Sec. 9276, R.C.M. 1935; R.C.M. 1947, 93-4323.

27-18-904. Delivery of excess property and proceeds to defendant. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands and any proceeds of property attached unapplied on the judgment.

History: En. Sec. 104, p. 64, Bannack Stat.; re-en. Sec. 133, p. 159, L. 1867; re-en. Sec. 151, p. 58, Cod. Stat. 1871; re-en. Sec. 193, p. 87, L. 1877; re-en. Sec. 193, 1st Div. Rev. Stat. 1879; re-en. Sec. 195, 1st Div. Comp. Stat. 1887; re-en. Sec. 909, C. Civ. Proc. 1895; re-en. Sec. 6676, Rev. C. 1907; re-en. Sec. 9277, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 551; re-en. Sec. 9277, R.C.M. 1935; R.C.M. 1947, 93-4324(part).

27-18-905. Execution of balance due on judgment. If, after selling all property attached by him remaining in his hands and applying the proceeds, together with the proceeds of any debt or credit collected by him, deducting his fee, to the payment of the judgment, any balance shall remain due, the sheriff must proceed to collect such balance as upon an execution in other cases.

History: En. Sec. 104, p. 64, Bannack Stat.; re-en. Sec. 133, p. 159, L. 1867; re-en. Sec. 151, p. 58, Cod. Stat. 1871; re-en. Sec. 193, p. 87, L. 1877; re-en. Sec. 193, 1st Div. Rev. Stat. 1879; re-en. Sec. 195, 1st Div. Comp. Stat. 1887; re-en. Sec. 909, C. Civ. Proc. 1895; re-en. Sec. 6676, Rev. C. 1907; re-en. Sec. 9277, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 551; re-en. Sec. 9277, R.C.M. 1935; R.C.M. 1947, 93-4324(part).

27-18-906. Procedure when execution returned unsatisfied. If the execution is returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given pursuant to 27-18-301 or 27-18-722 or he may proceed, as in other cases, upon the return of an execution.

History: En. Sec. 105, p. 64, Bannack Stat.; re-en. Sec. 134, p. 159, L. 1867; re-en. Sec. 152, p. 58, Cod. Stat. 1871; re-en. Sec. 194, p. 88, L. 1877; re-en. Sec. 194, 1st Div. Rev. Stat. 1879; re-en. Sec. 196, 1st Div. Comp. Stat. 1887; re-en. Sec. 910, C. Civ. Proc. 1895; re-en. Sec. 6677, Rev. C. 1907; re-en. Sec. 9278, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 552; re-en. Sec. 9278, R.C.M. 1935; R.C.M. 1947, 93-4325.

Parts 10 through 14 reserved

Part 15

Attachment in Justice's Court

27-18-1501. Justice's authority to issue writ. A writ to attach the property of the defendant may be issued by the justice at the time of or after issuing summons and before answer, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit specified in 27-18-202.

History: En. Sec. 568, p. 155, Bannack Stat.; re-en. Sec. 674, p. 172, Cod. Stat. 1871; re-en. Sec. 734, 1st Div. Rev. Stat. 1879; re-en. Sec. 754, 1st Div. Comp. Stat. 1887; amd. Sec. 1560, C. Civ. Proc. 1895; re-en. Sec. 7026, Rev. C. 1907; re-en. Sec. 9659, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 866; re-en. Sec. 9659, R.C.M. 1935; amd. Sec. 6, Ch. 299, L.1977; R.C.M. 1947, 93-6908.

27-18-1502. Plaintiff's undertaking. Before issuing the writ, the justice must require a written undertaking in due form on the part of the plaintiff, with two or more sureties, in a sum of not less than $50 or more than $300, to the effect that if defendant recover judgment, the plaintiff will pay all costs that may be awarded to defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

History: En. Sec. 569, p. 155, Bannack Stat.; re-en. Sec. 675, p. 172, Cod. Stat. 1871; re-en. Sec. 735, 1st Div. Rev. Stat. 1879; re-en. Sec. 755, 1st Div. comp. Stat. 1887; amd. Sec. 1561, C. Civ. Proc. 1895; re-en. Sec. 7027, Rev. C. 1907; amd. Sec. 1, Ch. 86, L. 1911; re-en. Sec. 9660, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 867; re-en. Sec. 9660, R.C.M. 1935; R.C.M. 1947, 93-6909(part).

27-18-1503. Exception to sureties — justification. Within 2 days after or at any time before the service of the writ of attachment upon defendant, he may except to the sufficiency of the sureties, and if he fails to do so, he is deemed to have waived all objections to them. When excepted to, the sureties must, within 3 days after notice by the defendant of not less than 1 day, justify before the justice, and upon failure to justify or if others in their place fail to justify at the time and place appointed, the justice shall make an order vacating the writ of attachment.

History: En. Sec. 569, p. 155, Bannack Stat.; re-en. Sec. 675, p. 172, Cod. Stat. 1871; re-en. Sec. 735, 1st Div. Rev. Stat. 1879; re-en. Sec. 755, 1st Div. comp. Stat. 1887; amd. Sec. 1561, C. Civ. Proc. 1895; re-en. Sec. 7027, Rev. C. 1907; amd. Sec. 1, Ch. 86, L. 1911; re-en. Sec. 9660, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 867; re-en. Sec. 9660, R.C.M. 1935; R.C.M. 1947, 93-6909(part).

27-18-1504. Form and content of writ — defendant's undertaking to prevent levy. The writ may be directed to the sheriff or any constable of the county or the sheriff of any other county and must require him to attach and safely keep all the property of the defendant in his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant has given him security by the undertaking of two sufficient sureties in an amount sufficient to satisfy such demand, besides costs, in which case to take such undertaking. Such undertaking is to be to the plaintiff or plaintiffs in the action and shall be approved in writing on the back thereof by the plaintiff or plaintiffs or his or their attorney or attorneys or, upon their refusal, by the justice issuing such writ.

History: En. Sec. 570, p. 155, Bannack Stat.; re-en. Sec. 676, p. 172, Cod. Stat. 1871; re-en. Sec. 736, 1st Div. Rev. Stat. 1879; re-en. Sec. 756, 1st Div. Comp. Stat. 1887; re-en. Sec. 1562, C. Civ. Proc. 1895; amd. Sec. 2, p. 141, L. 1899; re-en. Sec. 7028, Rev. C. 1907; re-en. Sec. 9661, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 868; re-en. Sec. 9661, R.C.M. 1935; R.C.M. 1947, 93-6910.

27-18-1505. Security for sheriff's costs. If the sheriff will incur substantial costs in transporting, keeping, or storing the property seized, the party requesting service of a writ of attachment shall provide a bond or other security to pay for all costs which may be incurred as a result of the service of such writ.

History: En. Sec. 4393, Pol. C. 1895; re-en. Sec. 3022, Rev. C. 1907; re-en. Sec. 4786, R.C.M. 1921; Cal. Pol. C. Sec. 4185; re-en. Sec. 4786, R.C.M. 1935; amd. Sec. 1, Ch. 426, L. 1977; R.C.M. 1947, 16-2714(part).

27-18-1506. Applicability of procedure in district court. Part 1, except 27-18-101; 27-18-207, 27-18-303, 27-18-304, 27-18-306 through 27-18-308; parts 4, 5, and 6, except 27-18-406; 27-18-711 through 27-18-713, 27-18-721 through 27-18-732; and parts 8 and 9, except 27-18-901, are applicable to attachments issued in justices' courts, the word "constable" being substituted for the word "sheriff" whenever the writ is directed to a constable, and the word "justice" substituted for "judge".

History: En. Sec. 571, p. 155, Bannack Stat.; re-en. Sec. 677, p. 172, Cod. Stat. 1871; re-en. Sec. 737, 1st Div. Rev. Stat. 1879; re-en. Sec. 757, 1st Div. Comp. Stat. 1887; re-en. Sec. 1563, C. Civ. Proc. 1895; re-en. Sec. 7029, Rev. C. 1907; re-en. Sec. 9662, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 869; re-en. Sec. 9662, R.C.M. 1935; R.C.M. 1947, 93-6911.

CHAPTER 19

INJUNCTIONS

Part 1 — General Provisions

Section
27-19-101. Definition of injunction — by whom granted.
27-19-102. When final injunction may be granted to prevent breach of obligation.
27-19-103. When injunction may not be granted.
27-19-104. Contents of complaint — action for injunction by an association.

Part 2 — Availability of Preliminary Injunction

27-19-201. When preliminary injunction may be granted.
27-19-202. Preliminary injunction pending action for restraint of trade.
27-19-203. Preliminary injunction pending action by public service commission.
27-19-204. Issuance without bond.

Part 3 — Procedure for Obtaining Preliminary Injunction

27-19-301. When notice of application required.
27-19-302. Notice requirements — order to suspend corporation's business.
27-19-303. Time of granting injunction, evidence required.
27-19-304. Service of injunction order.
27-19-305. Restraining order.
27-19-306. Security for damages.
Sections 27-19-307 through 27-19-310 reserved.
27-19-311. Order to show cause.
27-19-312. Effect of verified answer at hearing.
27-19-313. New undertaking for security following hearing.

Part 4 — Dissolution or Modification of Preliminary Injunction

27-19-401. Application to dissolve or modify injunction granted without notice.
27-19-402. Evidence upon hearing.
27-19-403. New undertaking for security following hearing.
27-19-404. When injunction dissolved or modified.
27-19-405. Defendant's undertaking for security upon dissolution.
27-19-406. Costs upon dissolution.

Part 1

General Provisions

27-19-101. Definition of injunction — by whom granted. An injunction is an order requiring a person to refrain from a particular act. The order may be granted by the court in which the action is brought or by a judge thereof and, when made by a judge, be enforced as the order of the court.

History: En. Sec. 82, p. 58, Bannack Stat.; amd. Sec. 111, p. 154, L. 1867; re-en. Sec. 128, p. 52, Cod. Stat. 1871; re-en. Sec. 170, p. 79, L. 1877; re-en. Sec. 170, 1st Div. Rev. Stat. 1879; re-en. Sec. 172, 1st Div. Comp. Stat. 1887; amd. Sec. 870, C. Civ. Proc. 1895; re-en. Sec. 6642, Rev. C. 1907; re-en. Sec. 9240, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 525; re-en. Sec. 9240, R.C.M. 1935; R.C.M. 1947, 93-4201.

27-19-102. When final injunction may be granted to prevent breach of obligation. Except where otherwise provided by the provisions of the code governing specific and preventive relief (chapter 1, part 4, of this title and Title 28, chapter 2, parts 16 and 17), a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant where:

(1) pecuniary compensation would not afford adequate relief;

(2) it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;

(3) the restraint is necessary to prevent a multiplicity of judicial proceedings; or

(4) the obligation arises from a trust.

History: En. Sec. 4462, Civ. C. 1895; re-en. Sec. 6120, Rev. C. 1907; re-en. Sec. 9241, R.C.M. 1921; Cal. Civ. C. Sec. 3422; Field Civ. C. Sec. 1911; re-en. Sec. 9241, R.C.M. 1935; R.C.M. 1947, 93-4202.

27-19-103. When injunction may not be granted. An injunction cannot be granted:

(1) to stay a judicial proceeding pending at the commencement of an action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings;

(2) to stay proceedings in a court of the United States;

(3) to stay proceedings in another state upon a judgment of a court of that state;

(4) to prevent the execution of a public statute by officers of the law for the public benefit;

(5) to prevent the breach of a contract the performance of which would not be specifically enforced;

(6) to prevent the exercise of a public or private office, in a lawful manner, by the person in possession;

(7) to prevent a legislative act by a municipal corporation;

(8) in labor disputes under any other or different circumstances or conditions than if the controversy were of another or different character or between parties neither or none of whom were laborers or interested in labor questions.

History: En. Sec. 4463, Civ. C. 1895; re-en. Sec. 6121, Rev. C. 1907; amd. Sec. 1, Ch. 28, L. 1913; re-en. Sec. 9242, R.C.M. 1921; Cal. Civ. C. Sec. 3423; Based on Field Civ. C. Sec. 1912; re-en. Sec. 9242, R.C.M. 1935; R.C.M. 1947, 93-4203.

27-19-104. Contents of complaint — action for injunction by an association. Whenever an action for injunctive relief is initiated by a citizens' group or other public interest association and it appears by the complaint that there is an injury to a property or civil right of individual members of the association, which injury is distinguishable from an injury to the public generally, the names and addresses of injured members and a statement of the injury shall be provided in the complaint. An injunction may not be granted unless such information is provided in the complaint.

History: En. 93-4204.1 by Sec. 1, Ch. 170, L. 1977; R.C.M. 1947, 93-4204.1.

Part 2

Availability of Preliminary Injunction

27-19-201. When preliminary injunction may be granted. An injunction order may be granted in the following cases:

(1) when it shall appear by the complaint that the plaintiff is entitled to the relief demanded and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

(2) when it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the plaintiff;

(3) when it shall appear during the litigation that the defendant is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual;

(4) when it appears by affidavit that the defendant, during the pendency of the action, threatens or is about to remove or to dispose of his property with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition.

History: En. Sec. 83, p. 58, Bannack Stat.; re-en. Sec. 112, p. 154, L. 1867; re-en. Sec. 129, p. 52, Cod. Stat. 1871; re-en. Sec. 171, p. 79, L. 1877; re-en. Sec. 171, 1st Div. Rev. Stat. 1879; re-en. Sec. 173, 1st Div. Comp. Stat. 1887; amd. Sec. 871, C. Civ. Proc. 1895; re-en. Sec. 6643, Rev. C. 1907; re-en. Sec. 9243, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 526; re-en. Sec. 9243, R.C.M. 1935; R.C.M. 1947, 93-4204.

27-19-202. Preliminary injunction pending action for restraint of trade. Whenever any action, either civil or criminal, shall have been instituted in court in this state against any person for price fixing or regulating the production of any article of commerce or of the product of the soil, for consumption by the people, the court in which such action is pending is authorized to issue an injunction to restrain any such person from doing business in this state pending the final determination of said action so instituted.

History: En. Sec. 1, Ch. 93, L. 1905; re-en. Sec. 6654, Rev. C. 1907; re-en. Sec. 9254, R.C.M. 1921; re-en. Sec. 9254, R.C.M. 1935; amd. Sec. 56, Ch. 100, L. 1973; amd. Sec. 3, Ch. 138, L. 1975; R.C.M. 1947, 93-4215(1).

27-19-203. Preliminary injunction pending action by public service commission. When the public service commission is conducting an adjudicatory proceeding or formal investigation relating to continuation or interruption of service upon the motion of the consumer counsel or the interested person or his legal representative, a district court may, upon the application of the consumer counsel or the interested person or his legal representative, enter a restraining order against any person respondent in the adjudicatory proceeding or investigation. Such a restraining order may prohibit the respondent and his agents, employees, licensees, and assignees from acting in the manner complained of in the proceeding before the commission until the commission has rendered its decision in the matter. The restraining order may include an order to show cause why the order should not become an injunction for the duration of the proceeding before the commission.

History: En. Sec. 1, Ch. 93, L. 1905; re-en. Sec. 6654, Rev. C. 1907; re-en. Sec. 9254, R.C.M. 1921; re-en. Sec. 9254, R.C.M. 1935; amd. Sec. 56, Ch. 100, L. 1973; amd. Sec. 3, Ch. 138, L. 1975; R.C.M. 1947, 93-4215(2).

27-19-204. Issuance without bond. Said injunction shall issue as in cases of equity, without bond, upon the application of the county attorney of the county in which such action is pending or upon the application of the attorney general in the name of the state of Montana, upon a prima facie showing that an action, civil or criminal, has been so instituted and is so pending, charging such person or persons, corporation or corporations, foreign or domestic, with such violation.

History: En. Sec. 2, Ch. 93, L. 1905; re-en. Sec. 6655, Rev. C. 1907; re-en. Sec. 9255, R.C.M. 1921; re-en. Sec. 9255, R.C.M. 1935; amd. Sec. 57, Ch. 100, L. 1973; R.C.M. 1947, 93-4216.

Part 3

Procedure for Obtaining Preliminary Injunction

27-19-301. When notice of application required. The order may be granted upon or without notice, in the discretion of the court or judge, unless the defendant has answered, in which case it can be granted only upon notice or an order to show cause. In no case shall an injunction order be issued without notice unless it appears to the court or judge that irreparable injury would result by the delay of giving notice.

History: En. Sec. 85, p. 59, Bannack Stat.; re-en. Sec. 114, p. 154, L. 1867; re-en. Sec. 131, p. 52, Cod. Stat. 1871; re-en. Sec. 173, p. 79, L. 1877; re-en. Sec. 173, 1st Div. Rev. Stat. 1879; re-en. Sec. 175, 1st Div. Comp. Stat. 1887; en. Sec. 873, C. Civ. Proc. 1895; re-en. Sec. 6645, Rev. C. 1907; re-en. Sec. 9245, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 528; re-en. Sec. 9245, R.C.M. 1935; R.C.M. 1947, 93-4206(part).

27-19-302. Notice requirements — order to suspend corporation's business. An injunction order to suspend the general and ordinary business of a corporation must not be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, except when the state is a party to the action.

History:En. Sec. 88, p. 59, Bannack Stat.; amd. Sec. 117, p. 155, L. 1867; re-en. Sec. 134, p. 53, Cod. Stat. 1871; re-en. Sec. 176, p. 81, L. 1877; re-en. Sec. 176, 1st Div. Rev. Stat. 1879; re-en. Sec. 178, 1st Div. Comp. Stat. 1887; amd. Sec. 881, C. Civ. Proc. 1895; re-en. Sec. 6653, Rev. C. 1907; re-en. Sec. 9253, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 531; re-en. Sec. 9253, R.C.M. 1935; R.C.M. 1947, 93-4214.

27-19-303. Time of granting injunction, evidence required. The injunction order may be granted at the time of issuing the summons upon the complaint or at any time afterward before judgment upon affidavits. In the one case, the complaint, with or without affidavits to support it, and, in the other, the affidavits shall show satisfactorily that sufficient grounds exist therefor. An injunction order shall not be granted on the complaint alone unless:

(1) it be duly verified;

(2) the material allegations of the complaint setting forth the grounds therefor be made positively and not upon information and belief.

History: En. Sec. 84, p. 58, Bannack Stat.; re-en. Sec. 113, p. 154, L. 1867; re-en. Sec. 130, p. 52, Cod. Stat. 1871; re-en. Sec. 172, p. 79, L. 1877; re-en. Sec. 172, 1st Div. Rev. Stat. 1879; re-en. Sec. 174, 1st Div. Comp. Stat. 1887; amd. Sec. 872, C. Civ. Proc. 1895; re-en. Sec. 6644, Rev. C. 1907; re-en. Sec. 9244, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 527; re-en. Sec. 9244, R.C.M. 1935; R.C.M. 1947, 93-4205(part).

27-19-304. Service of injunction order. When granted on the complaint, a copy thereof, including the verification, shall be served with the injunction order; when granted upon the complaint with affidavits to support it or upon affidavits alone, a copy of the affidavits likewise shall be served with the injunction order. Any person qualified to serve a summons may serve the order and affidavits.

History: En. Sec. 84, p. 58, Bannack Stat.; re-en. Sec. 113, p. 154, L. 1867; re-en. Sec. 130, p. 52, Cod. Stat. 1871; re-en. Sec. 172, p. 79, L. 1877; re-en. Sec. 172, 1st Div. Rev. Stat. 1879; re-en. Sec. 174, 1st Div. Comp. Stat. 1887; amd. Sec. 872, C. Civ. Proc. 1895; re-en. Sec. 6644, Rev. C. 1907; re-en. Sec. 9244, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 527; re-en. Sec. 9244, R.C.M. 1935; R.C.M. 1947, 93-4205(part).

27-19-305. Restraining order. Where an application for an injunction is made upon notice or an order to show cause, either before or after answer, the court or judge may enjoin the defendant, until the hearing and decision of the application, by an order which is called a restraining order. In no case shall a restraining order be issued without notice unless it appears to the court or judge that irreparable injury would result by the delay of giving notice.

History: En. Sec. 85, p. 59, Bannack Stat.; re-en. Sec. 114, p. 154, L. 1867; re-en. Sec. 131, p. 52, Cod. Stat. 1871; re-en. Sec. 173, p. 79, L. 1877; re-en. Sec. 173, 1st Div. Rev. Stat. 1879; re-en. Sec. 175, 1st Div. Comp. Stat. 1887; en. Sec. 873, C. Civ. Proc. 1895; re-en. Sec. 6645, Rev. C. 1907; re-en. Sec. 9245, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 528; re-en. Sec. 9245, R.C.M. 1935; R.C.M. 1947, 93-4206(part).

27-19-306. Security for damages. (1) On granting an injunction or restraining order, the court or judge may require, except when the state, a county, or any subdivision thereof or a municipal corporation or a married person in a suit for divorce against his or her spouse is a party plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction if the court finally decide that the plaintiff was not entitled thereto.

(2) Within 5 days after the service of the injunction, the defendant may except to the sufficiency of the sureties. If the plaintiff fails to do so, such plaintiff is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than 2 or more than 5 days, must justify before a judge or clerk in the same manner as upon bail on arrest, and upon failure to justify or if others in their place fail to justify at the time and place appointed, the order granting an injunction shall be dissolved.

History: En. Sec. 86, p. 59, Bannack Stat.; re-en. Sec. 115, p. 154, L. 1867; re-en. Sec. 132, p. 52, Cod. Stat. 1871; re-en. Sec. 174, p. 79, L. 1877; re-en. Sec. 174, 1st Div. Rev. Stat. 1879; re-en. Sec. 176, 1st Div. Comp. Stat. 1887; en. Sec. 874, C. Civ. Proc. 1895; re-en. Sec. 6646, Rev. C. 1907; re-en. Sec. 9246, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 529; re-en. Sec. 9246, R.C.M. 1935; amd. Sec. 53, Ch. 535, L. 1975; R.C.M. 1947, 93-4207.

27-19-307 through 27-19-310 reserved.

27-19-311. Order to show cause. If the court or judge deem it proper that the defendant or any of the several defendants should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted and the defendant may in the meantime be restrained. Cause may be shown upon affidavits or oral testimony.

History: En. Sec. 87, p. 59, Bannack Stat.; re-en. Sec. 116, p. 155, L. 1867; re-en. Sec. 133, p. 52, Cod. Stat. 1871; re-en. Sec. 175, p. 81, L. 1877; re-en. Sec.

175, 1st Div. Rev. Stat. 1879; re-en. Sec. 177, 1st Div. Comp. Stat. 1887; amd. Sec. 875, C. Civ. Proc. 1895; re-en. Sec. 6647, Rev. C. 1907; re-en. Sec. 9247, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 530; re-en. Sec. 9247, R.C.M. 1935; R.C.M. 1947, 93-4208.

27-19-312. Effect of verified answer at hearing. Upon the hearing of a contested application for an injunction order, a verified answer has the effect only of an affidavit.

History: En. Sec. 877, C. Civ. Proc. 1895; re-en. Sec. 6649, Rev. C. 1907; re-en. Sec. 9249, R.C.M. 1921; re-en. Sec. 9249, R.C.M. 1935; R.C.M. 1947, 93-4210(part).

27-19-313. New undertaking for security following hearing. On a hearing to show cause, the court or judge may require a new undertaking, in the same or a different sum, to be given by the plaintiff, with like sureties and to the like effect as upon granting of the original order. The persons executing the new undertaking become liable thereon as if they had executed it upon the granting of the original order. The persons who executed the original undertaking remain liable thereon until the new undertaking is given and approved, and no longer.

History: En. Sec. 876, C. Civ. Proc. 1895; re-en. Sec. 6648, Rev. C. 1907; re-en. Sec. 9248, R.C.M. 1921; re-en. Sec. 9248, R.C.M. 1935; R.C.M. 1947, 93-4209(part).

Part 4

Dissolution or Modification of Preliminary Injunction

27-19-401. Application to dissolve or modify injunction granted without notice. If an injunction order be granted without notice, the defendant, at any time before the trial, may apply, upon reasonable notice or upon order to show cause returnable at a specified time or forthwith after service thereof, to the judge who granted the injunction order or to the court in which the action is brought to dissolve or modify the same. The application may be made upon the complaint and affidavit on which the injunction order was granted or upon affidavit on part of defendant, with or without the answer.

History: En. Sec. 89, p. 59, Bannack Stat.; re-en. Sec. 118, p. 155, L. 1867; re-en. Sec. 135, p. 53, Cod. Stat. 1871; re-en. Sec. 177, p. 81, L. 1877; re-en. Sec. 177, 1st Div. Rev. Stat. 1879; re-en. Sec. 179, 1st Div. Comp. Stat. 1887; amd. Sec. 878, C. Civ. Proc. 1895; re-en. Sec. 6650, Rev. C. 1907; re-en. Sec. 9250, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 532; re-en. Sec. 9250, R.C.M. 1935; R.C.M. 1947, 93-4211(part).

27-19-402. Evidence upon hearing. Upon the hearing to vacate or modify an injunction order, a verified answer has the effect only of an affidavit. If the application be made upon affidavits on part of defendant, but not otherwise, the plaintiff may oppose the same by affidavits or oral testimony, in addition to those on which the injunction order was granted. The defendant may also use oral testimony.

History: Ap. p. Sec. 877, C. Civ. Proc. 1895; re-en. Sec. 6649, Rev. C. 1907; re-en. Sec. 9249, R.C.M. 1921; re-en. Sec. 9249, R.C.M. 1935; Sec. 93-4210, R.C.M. 1947; Ap. p. Sec. 89, p. 59, Bannack Stat.; re-en. Sec. 118, p. 155, L. 1867; re-en. Sec. 135, p. 53, Cod. Stat. 1871; re-en. Sec. 177, p. 81, L. 1877; re-en. Sec. 177, 1st Div. Rev. Stat. 1879; re-en. Sec. 179, 1st Div. Comp. Stat. 1887; amd. Sec.

878, C. Civ. Proc. 1895; re-en. Sec. 6650, Rev. C. 1907; re-en. Sec. 9250, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 532; re-en. Sec. 9250, R.C.M. 1935; Sec. 93-4211, R.C.M. 1947; R.C.M. 1947, 93-4210(part), 93-4211(part).

27-19-403. New undertaking for security following hearing. Upon the hearing of an application to vacate or modify an injunction order, the court or judge may require a new undertaking, in the same or a different sum, to be given by the plaintiff, with like sureties and to the like effect as upon granting of the original order. The persons executing the new undertaking become liable thereon as if they had executed it upon the granting of the original order. The persons who executed the original undertaking remain liable thereon until the new undertaking is given and approved, and no longer.

History: En. Sec. 876, C. Civ. Proc. 1895; re-en. Sec. 6648, Rev. C. 1907; re-en. Sec. 9248, R.C.M. 1921; re-en. Sec. 9248, R.C.M. 1935; R.C.M. 1947, 93-4209(part).

27-19-404. When injunction dissolved or modified. If upon such application it satisfactorily appear that there is not sufficient ground for the injunction order, it shall be dissolved; or if it satisfactorily appear that the extent of the injunction order is too great, it shall be modified. The court or judge may vacate the injunction order where the alleged wrong or injury is not irreparable and is capable of being adequately compensated for in money.

History: Ap. p. Sec. 90, p. 60, Bannack Stat.; re-en. Sec. 119, p. 155, L. 1867; re-en. Sec. 136, p. 53, Cod. Stat. 1871; re-en. Sec. 178, p. 81, L. 1877; re-en. Sec. 178, 1st Div. Rev. Stat. 1879; re-en. Sec. 180, 1st Div. Comp. Stat. 1887; re-en. Sec. 879, C. Civ. Proc. 1895; re-en. Sec. 6651, Rev. C. 1907; re-en. Sec. 9251, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 533; re-en. Sec. 9251, R.C.M. 1935; Sec. 93-4212, R.C.M. 1947; Ap. p. Sec. 876, C. Civ. Proc. 1895; re-en. Sec. 6648, Rev. C. 1907; re-en. Sec. 9248, R.C.M. 1921; re-en. Sec. 9248, R.C.M. 1935; R.C.M. 1947, 93-4209(part), 93-4212.

27-19-405. Defendant's undertaking for security upon dissolution. Upon the hearing mentioned in 27-19-403, the court or judge may vacate the injunction order upon the defendant's executing an undertaking in such form and amount and with such sureties as the court or judge shall direct, conditioned to indemnify the plaintiff against loss sustained by reason of vacating such injunction order.

History: En. Sec. 876, C. Civ. Proc. 1895; re-en. Sec. 6648, Rev. C. 1907; re-en. Sec. 9248, R.C.M. 1921; re-en. Sec. 9248, R.C.M. 1935; R.C.M. 1947, 93-4209(part).

27-19-406. Costs upon dissolution. Where an injunction order is granted without notice and the same is afterward dissolved upon application of the party enjoined thereby, the court or judge to whom the application to dissolve is made may award as costs of the application, against the plaintiff and in favor of the party applying, such sum as to the court or judge may appear just, not less than $10 or more than $100.

History: En. Sec. 880, C. Civ. Proc. 1895; re-en. Sec. 6652, Rev. C. 1907; re-en. Sec. 9252, R.C.M. 1921; re-en. Sec. 9252, R.C.M. 1935; R.C.M. 1947, 93-4213.

CHAPTER 20

RECEIVERS

Part 1 — General Provisions

Section

27-20-101. Definition of property.
27-20-102. When and by whom receiver appointed.

27-28-103. Appointment of receiver upon dissolution of corporation.

Part 2 — Appointment Procedure

27-20-201. Notice of application for appointment before judgment.
27-20-202. Interested persons not to be appointed without consent.
27-20-203. Security to cover damages caused by appointment upon ex parte application.

Part 3 — Action by Receivers—Removal

27-20-301. Oath and undertaking to faithfully discharge duties.
27-20-302. Powers of receiver.
27-20-303. Investment of funds.
27-20-304. Removal of receiver.

Part 1

General Provisions

27-20-101. Definition of property. The word "property", used in this chapter, includes the rents, profits, or other income and the increase of real or personal property.

History: En. Sec. 951, C. Civ. Proc. 1895; re-en. Sec. 6699, Rev. C. 1907; re-en. Sec. 9302, R.C.M. 1921; re-en. Sec. 9302, R.C.M. 1935; R.C.M. 1947, 93-4402(part).

27-20-102. When and by whom receiver appointed. A receiver may be appointed by the court in which an action is pending or by the judge thereof:

(1) in an action by a vendor to vacate a fraudulent purchase of property, by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff or of any party whose right to or interest in the property or fund or the proceeds thereof is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured;

(2) in an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured or that the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt;

(3) after judgment, to carry the judgment into effect;

(4) after judgment, to dispose of the property according to the judgment or to preserve it during the pendency of an appeal; or in proceedings in aid of execution, when an execution has been returned unsatisfied or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

(5) in all other cases where, before February 1, 1864, receivers have been appointed by the usages of courts of equity.

History: En. Sec. 116, p. 67, Bannack Stat.; re-en. Sec. 143, p. 160, L. 1867; re-en. Sec. 179, p. 62, Cod. Stat. 1871; en. Sec. 221, p. 93, L. 1877; re-en. Sec. 221, 1st Div. Rev. Stat. 1879; re-en. Sec. 229, 1st Div. Comp. Stat. 1887; re-en. Sec. 950, C. Civ. Proc. 1895; re-en. Sec. 6698, Rev. C. 1907; re-en. Sec. 9301, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 564; re-en. Sec. 9301, R.C.M. 1935; amd. Sec. 142, Ch. 300, L. 1967; R.C.M. 1947, 93-4401.

27-20-103. Appointment of receiver upon dissolution of corporation. Upon the dissolution of any corporation, the district court of the county in which the corporation carries on its business or has its principal place of business, on application of any creditor of the corporation or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, to collect the debts and property due and belonging to the corporation, to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members.

History: En. Sec. 222, p. 94, L. 1877; re-en. Sec. 222, 1st Div. Rev. Stat. 1879; re-en. Sec. 230, 1st Div. Comp. Stat. 1887; re-en. Sec. 952, C. Civ. Proc. 1895; re-en. Sec. 6700, Rev. C. 1907; re-en. Sec. 9303, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 565; re-en. Sec. 9303, R.C.M. 1935; R.C.M. 1947, 93-4403.

Part 2

Appointment Procedure

27-20-201. Notice of application for appointment before judgment. Notice of an application for the appointment of a receiver in an action before judgment therein must be given to the adverse party unless he has failed to appear in the action and the time limited for his appearance has expired or unless it shall appear to the court that there is immediate danger that the property or fund will be removed beyond the jurisdiction of the court or lost, materially injured, destroyed, or unlawfully disposed of.

History: En. Sec. 951, C. Civ. Proc. 1895; re-en. Sec. 6699, Rev. C. 1907; re-en. Sec. 9302, R.C.M. 1921; re-en. Sec. 9302, R.C.M. 1935; R.C.M. 1947, 93-4402(part).

27-20-202. Interested persons not to be appointed without consent. No party, attorney, or person interested in an action can be appointed receiver therein without the written consent of the parties, filed with the clerk.

History: En. Sec. 223, p. 94, L. 1877; re-en. Sec. 223, 1st Div. Rev. Stat. 1879; re-en. Sec. 231, 1st Div. Comp. Stat. 1887; re-en. Sec. 953, C. Civ. Proc. 1895; re-en. Sec. 6701, Rev. C. 1907; re-en. Sec. 9304, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 566; re-en. Sec. 9304, R.C.M. 1935; R.C.M. 1947, 93-4404(part).

27-20-203. Security to cover damages caused by appointment upon ex parte application. If a receiver be appointed upon an ex parte application, the court, before making the order, may require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking.

History: En. Sec. 223, p. 94, L. 1877; re-en. Sec. 223, 1st Div. Rev. Stat. 1879; re-en. Sec. 231, 1st Div. Comp. Stat. 1887; re-en. Sec. 953, C. Civ. Proc. 1895; re-en. Sec. 6701, Rev. C. 1907; re-en. Sec. 9304, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 566; re-en. Sec. 9304, R.C.M. 1935; R.C.M. 1947, 93-4404(part).

Part 3

Action by Receivers — Removal

27-20-301. Oath and undertaking to faithfully discharge duties. Before entering upon his duties, the receiver must be sworn to perform them faithfully and, with one or more sureties approved by the court or judge, execute an undertaking to such person and in such sum as the court or judge may direct, to the effect that he will faithfully discharge the duties of receiver in the action and obey the orders of the court therein. The court may at any time direct him to give new bonds with new sureties with the like effect. Such undertaking may be sued on as provided in 2-9-505.

History: En. Sec. 224, p. 94, L. 1877; re-en. Sec. 224, 1st Div. Rev. Stat. 1879; re-en. Sec. 232, 1st Div. Comp. Stat. 1887; re-en. Sec. 954, C. Civ. Proc. 1895; re-en. Sec. 6702, Rev. C. 1907; re-en. Sec. 9305, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 567; re-en. Sec. 9305, R.C.M. 1935; R.C.M. 1947, 93-4405(part).

27-20-302. Powers of receiver. The receiver has, under the control of the court, power to:

(1) bring and defend actions in his own name, as receiver;
(2) take and keep possession of the property;
(3) receive rents, collect debts, and compound for and compromise the same;
(4) make transfers; and
(5) generally do such acts respecting the property as the court may authorize.

History: En. Sec. 225, p. 94, L. 1877; re-en. Sec. 225, 1st Div. Rev. Stat. 1879; re-en. Sec. 233, 1st Div. Comp. Stat. 1887; re-en. Sec. 955, C. Civ. Proc. 1895; re-en. Sec. 6703, Rev. C. 1907; re-en. Sec. 9306, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 568; re-en. Sec. 9306, R.C.M. 1935; R.C.M. 1947, 93-4406.

27-20-303. Investment of funds. Funds in the hands of a receiver may be invested upon interest, by order of the court, but no such order can be made except upon the consent of all the parties to the action.

History: En. Sec. 226, p. 94, L. 1877; re-en. Sec. 226, 1st Div. Rev. Stat. 1879; re-en. Sec. 234, 1st Div. Comp. Stat. 1887; re-en. Sec. 956, C. Civ. Proc. 1895; re-en. Sec. 6704, Rev. C. 1907; re-en. Sec. 9307, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 569; re-en. Sec. 9307, R.C.M. 1935; R.C.M. 1947, 93-4407.

27-20-304. Removal of receiver. The court may at any time remove a receiver.

History: En. Sec. 224, p. 94, L. 1877; re-en. Sec. 224, 1st Div. Rev. Stat. 1879; re-en. Sec. 232, 1st Div. Comp. Stat. 1887; re-en. Sec. 954, C. Civ. Proc. 1895; re-en. Sec. 6702, Rev. C. 1907; re-en. Sec. 9305, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 567; re-en. Sec. 9305, R.C.M. 1935; R.C.M. 1947, 93-4405(part).

CHAPTERS 21 THROUGH 24

RESERVED

CHAPTER 25

CERTIORARI — WRIT OF REVIEW

Part 1 — General Provisions

Section
27-25-101. Name of writ.
27-25-102. When and by whom granted.
27-25-103. Application of rules of procedure.

Part 2 — Procedure for Obtaining and Serving Writ

27-25-201. Application for writ — notice.
27-25-202. Contents of writ.
27-25-203. Stay of proceedings.
27-25-204. Service of writ.
27-25-205. To whom writ directed — return.

Part 3 — Procedure Upon Return of Writ

27-25-301. Time for return and hearing.
27-25-302. Correction of defective return.
27-25-303. Scope of review upon writ.
27-25-304. Hearing and judgment.
27-25-305. Copy of judgment to inferior tribunal or officer.

Part 1

General Provisions

27-25-101. Name of writ. The writ of certiorari may be denominated the writ of review.

History: En. Sec. 371, p. 121, Bannack Stat.; re-en. Sec. 430, p. 222, L. 1867; re-en. Sec. 506, p. 139, Cod. Stat. 1871; re-en. Sec. 536, p. 179, L. 1877; re-en. Sec. 536, 1st Div. Rev. Stat. 1879; re-en. Sec. 554, 1st Div. Comp. Stat. 1887; re-en. Sec. 1940, C. Civ. Proc. 1895; re-en. Sec. 7202, Rev. C. 1907; re-en. Sec. 9836, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1067; re-en. Sec. 9836, R.C.M. 1935; R.C.M. 1947, 93-9001.

27-25-102. When and by whom granted. A writ of review may be granted by:

(1) the supreme court and any justice of the supreme court, in proceedings for contempt in the district court; or

(2) the supreme court or the district court or any judge thereof, when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board, or officer and there is no appeal or, in the judgment of the court, any plain, speedy, and adequate remedy.

History: En. Sec. 372, p. 121, Bannack Stat.; re-en. Sec. 431, p. 222, L. 1867; re-en. Sec. 507, p. 139, Cod. Stat. 1871; re-en. Sec. 537, p. 180, L. 1877; re-en. Sec. 537, 1st Div. Rev. Stat. 1879; re-en. Sec. 555, 1st Div. Comp. Stat. 1887; re-en. Sec. 1941, C. Civ. Proc. 1895; re-en. as amd. Sec. 7203, Rev. C. 1907; re-en. Sec. 9837, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1068; re-en. Sec. 9837, R.C.M. 1935; R.C.M. 1947, 93-9002.

27-25-103. Application of rules of procedure. Except as otherwise provided in this chapter, the provisions of [93-2301 to 93-8717] are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter. The provisions of [93-2301 to 93-8717] relative to new trials and appeals, except insofar as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in said chapter.

History: Ap. p. Sec. 2000, C. Civ. Proc. 1895; re-en. Sec. 7232, Rev. C. 1907; re-en. Sec. 9866, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1109; re-en. Sec. 9866, R.C.M. 1935; Sec. 93-3902, R.C.M. 1947; Ap. p. Sec. 2001, C. Civ. Proc. 1895; re-en. Sec. 7233, Rev. C. 1907; re-en. Sec. 9867, R.C.M. 1921; Cal. C. Civ. Proc.

Sec. 1110; re-en. Sec. 9867, R.C.M. 1935; Sec. 93-9303, R.C.M. 1947; R.C.M. 1947, 93-9302(part), 93-9303(part).

Part 2

Procedure for Obtaining and Serving Writ

27-25-201. Application for writ — notice. The application must be made on affidavit by the party beneficially interested; and the court may require a notice of the application to be given to the adverse party, grant an order to show cause why it should not be allowed, or grant the writ without notice.

History: En. Sec. 373, p. 121, Bannack Stat.; re-en. Sec. 432, p. 222, L. 1867; re-en. Sec. 508, p. 139, Cod. Stat. 1871; re-en. Sec. 538, p. 180, L. 1877; re-en. Sec. 538, 1st Div. Rev. Stat. 1879; re-en. Sec. 556, 1st Div. Comp. Stat. 1887; re-en. Sec. 1942, C. Civ. Proc. 1895; re-en. Sec. 7204, Rev. C. 1907; re-en. Sec. 9838, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1069; re-en. Sec. 9838, R.C.M. 1935; R.C.M. 1947, 93-9003.

27-25-202. Contents of writ. The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court, and require the party, in the meantime, to desist from further proceedings in the matter to be reviewed.

History: En. Sec. 375, p. 121, Bannack Stat.; re-en. Sec. 434, p. 222, L. 1867; re-en. Sec. 510, p. 139, Cod. Stat. 1871; re-en. Sec. 540, p. 180, L. 1877; re-en. Sec. 540, 1st Div. Rev. Stat. 1879; re-en. Sec. 558, 1st Div. Comp. Stat. 1887; re-en. Sec. 1944, C. Civ. Proc. 1895; re-en. Sec. 7206, Rev. C. 1907; re-en. Sec. 9840, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1071; re-en. Sec. 9840, R.C.M. 1935; R.C.M. 1947, 93-9005.

27-25-203. Stay of proceedings. If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ. These words may be inserted or omitted, in the sound discretion of the court or judge; but if omitted, the power of the inferior court or officer is not suspended or the proceedings stayed.

History: En. Sec. 376, p. 122, Bannack Stat.; re-en. Sec. 435, p. 223, L. 1867; re-en. Sec. 511, p. 140, Cod. Stat. 1871; re-en. Sec. 541, p. 180, L. 1877; re-en. Sec. 541, 1st Div. Rev. Stat. 1879; re-en. Sec. 559, 1st Div. Comp. Stat. 1887; re-en. Sec. 1945, C. Civ. Proc. 1895; re-en. Sec. 7207, Rev. C. 1907; re-en. Sec. 9841, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1072; re-en. Sec. 9841, R.C.M. 1935; R.C.M. 1947, 93-9006.

27-25-204. Service of writ. The writ must be served in the manner as a summons in civil action, except when otherwise expressly directed by the court or judge.

History: En. Sec. 377, p. 122, Bannack Stat.; re-en. Sec. 436, p. 223, L. 1867; re-en. Sec. 512, p. 140, Cod. Stat. 1871; re-en. Sec. 542, p. 180, L. 1877; re-en. Sec. 542, 1st Div. Rev. Stat. 1879; re-en. Sec. 560, 1st Div. Comp. Stat. 1887; re-en. Sec. 1946, C. Civ. Proc. 1895; re-en. Sec. 7208, Rev. C. 1907; re-en. Sec. 9842, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1073; re-en. Sec. 9842, R.C.M. 1935; R.C.M. 1947, 93-9007.

27-25-205. To whom writ directed — return. The writ may be directed to the inferior tribunal, board, or officer or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required.

History: En. Sec. 374, p. 121, Bannack Stat.; re-en. Sec. 433, p. 222, L. 1867; re-en. Sec. 509, p. 139, Cod. Stat. 1871; re-en. Sec. 539, p. 180, L. 1877; re-en. Sec. 539, 1st Div. Rev. Stat. 1879; re-en. Sec. 557, 1st Div. Comp. Stat. 1887; re-en. Sec. 1943, C. Civ. Proc. 1895; re-en. Sec. 7205, Rev. C. 1907; re-en. Sec. 9839, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1070; re-en. Sec. 9839, R.C.M. 1935; R.C.M. 1947, 93-9004.

Part 3

Procedure Upon Return of Writ

27-25-301. Time for return and hearing. Writs of review issued by the supreme court or by a district court or district judge may, in the discretion of the court issuing the writ, be made returnable and a hearing thereon be heard at any time.

History: En. Sec. 565, p. 185, L. 1877; re-en. Sec. 565, 1st Div. Rev. Stat. 1879; re-en. Sec. 583, 1st Div. comp. Stat. 1887; amd. Sec. 1990, C. Civ. Proc. 1895; re-en. Sec. 7231, Rev. C. 1907; re-en. Sec. 9865, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1108; re-en. Sec. 9865, R.C.M. 1935; R.C.M. 1947, 93-9301(part).

27-25-302. Correction of defective return. If the return of the writ be defective, the court or judge may order a further return to be made.

History: En. Sec. 379, p. 122, Bannack Stat.; re-en. Sec. 438, p. 223, L. 1867; re-en. Sec. 514, p. 140, Cod. Stat. 1871; re-en. Sec. 544, p. 181, L. 1877; re-en. Sec. 544, 1st Div. Rev. Stat. 1879; re-en. Sec. 562, 1st Div. Comp. Stat. 1887; re-en. Sec. 1948, C. Civ. Proc. 1895; re-en. Sec. 7210, Rev. C. 1907; re-en. Sec. 9844, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1075; re-en. Sec. 9844, R.C.M. 1935; R.C.M. 1947, 93-9009(part).

27-25-303. Scope of review upon writ. The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer.

History: En. Sec. 378, p. 122, Bannack Stat.; re-en. Sec. 437, p. 223, L. 1867; re-en. Sec. 513, p. 140, Cod. Stat. 1871; re-en. Sec. 543, p. 181, L. 1877; re-en. Sec. 543, 1st Div. Rev. Stat. 1879; re-en. Sec. 561, 1st Div. Comp. Stat. 1887; re-en. Sec. 1947, C. Civ. Proc. 1895; re-en. Sec. 7209, Rev. C. 1907; re-en. Sec. 9843, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1074; re-en. Sec. 9843, R.C.M. 1935; R.C.M. 1947, 93-9008.

27-25-304. Hearing and judgment. When a full return has been made, the court or judge must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming, annulling, or modifying the proceedings below.

History: En. Sec. 379, p. 122, Bannack Stat.; re-en. Sec. 438, p. 223, L. 1867; re-en. Sec. 514, p. 140, Cod. Stat. 1871; re-en. Sec. 544, p. 181, L. 1877; re-en. Sec. 544, 1st Div. Rev. Stat. 1879; re-en. Sec. 562, 1st Div. Comp. Stat. 1887; re-en. Sec. 1948, C. Civ. Proc. 1895; re-en. Sec. 7210, Rev. C. 1907; re-en. Sec. 9844, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1075; re-en. Sec. 9844, R.C.M. 1935; R.C.M. 1947, 93-9009(part).

27-25-305. Copy of judgment to inferior tribunal or officer. A copy of the judgment, signed by the clerk, must be transmitted to the inferior tribunal, board, or officer having the custody of the record or proceeding certified upon.

History: En. Sec. 380, p. 122, Bannack Stat.; re-en. Sec. 439, p. 223, L. 1867; re-en. Sec. 515, p. 140, Cod. Stat. 1871; re-en. Sec. 545, p. 181, L. 1877; re-en.

Sec. 545, 1st Div. Rev. Stat. 1879; re-en. Sec. 563, 1st Div. Comp. Stat. 1887; re-en. Sec. 1949, C. Civ. Proc. 1895; re-en. Sec. 7211, Rev. C. 1907; re-en. Sec. 9845, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1076; re-en. Sec. 9845, R.C.M. 1935; R.C.M. 1947, 93-9010.

CHAPTER 26

MANDAMUS — WRIT OF MANDATE

Part 1 — General Provisions

Section
27-26-101. Name of writ.
27-26-102. When and by whom issued.
27-26-103. Application of rules of procedure.

Part 2 — Procedure for Obtaining, Serving, and Enforcing Writ

27-26-201. Application for writ.
27-26-202. Notice of application.
27-26-203. Form and content of writ.
27-26-204. Factors that determine whether writ peremptory or alternative.
27-26-205. Service of writ.
27-26-206. Enforcement of writ — penalty.

Part 3 — Procedure Upon Return of Writ

27-26-301. Time for return and hearing.
27-26-302. Answer of adverse party.
27-26-303. Jury trial.
27-26-304. Applicant's response to answer.
27-26-305. Motion for new trial.
27-26-306. Argument to proceed if no new trial.
27-26-307. Procedure when there is no answer or no material issue of fact.

Part 4 — Judgment

27-26-401. Default not permitted.
27-26-402. Judgment for applicant.
27-26-403. Officers not to be personally liable.

Part 1

General Provisions

27-26-101. Name of writ. The writ of mandamus may be denominated a writ of mandate.

History: En. Sec. 382, p. 122, Bannack Stat.; re-en. Sec. 441, p. 224, L. 1867; re-en. Sec. 517, p. 141, Cod. Stat. 1871; re-en. Sec. 547, p. 181, L. 1877; re-en. Sec. 547, 1st Div. Rev. Stat. 1879; re-en. Sec. 565, 1st Div. Comp. Stat. 1887; re-en. Sec. 1960, C. Civ. Proc. 1895; re-en. Sec. 7213, Rev. C. 1907; re-en. Sec. 9847, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1084; re-en. Sec. 9847, R.C.M. 1935; R.C.M. 1947, 93-9101.

27-26-102. When and by whom issued. (1) It may be issued by the supreme court or the district court or any judge of the district court to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.

(2) The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law.

History: (1)En. Sec. 383, p. 122, Bannack Stat.; amd. Sec. 442, p. 224, L. 1867; re-en. Sec. 518, p. 141, Cod. Stat. 1871; re-en. Sec. 548, p. 181, L. 1877; re-en. Sec. 548, 1st Div. Rev. Stat. 1879; re-en. Sec. 566, 1st Div. Comp. Stat. 1887; amd. Sec. 1961, C. Civ. Proc. 1895; re-en. Sec. 7214, Rev. C. 1907; re-en. Sec. 9848, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1085; re-en. Sec. 9848, R.C.M. 1935; Sec. 93-9102, R.C.M. 1947; (2)En. Sec. 384, p. 123, Bannack Stat.; re-en. Sec. 443, p. 224, L. 1867; re-en. Sec. 519, p. 141, Cod. Stat. 1871; re-en. Sec. 549, p. 181, L. 1877; re-en. Sec. 549, 1st Div. Rev. Stat. 1879; re-en. Sec. 567, 1st Div. Comp. Stat. 1887; amd. Sec. 1962, C. Civ. Proc. 1895; re-en. Sec. 7215, Rev. C. 1907; re-en. Sec. 9849, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1086; re-en. Sec. 9849, R.C.M. 1935; Sec. 93-9103, R.C.M. 1947; R.C.M. 1947, 93-9102, 93-9103(part).

27-26-103. Application of rules of procedure. Except as otherwise provided in this chapter, the provisions of [93-2301 to 93-8717] are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter. The provisions of [93-2301 to 93-8717] relative to new trials and appeals, except insofar as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in said chapter.

History: Ap. p. Sec. 2000, C. Civ. Proc. 1895; re-en. Sec. 7232, Rev. C. 1907; re-en. Sec. 9866, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1109; re-en. Sec. 9866, R.C.M. 1935; Sec. 93-3902, R.C.M. 1947; Ap. p. Sec. 2001, C. Civ. Proc. 1895; re-en. Sec. 7233, Rev. C. 1907; re-en. Sec. 9867, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1110; re-en. Sec. 9867, R.C.M. 1935; Sec. 93-9303, R.C.M. 1947; R.C.M. 1947, 93-9302(part), 93-9303(part).

Part 2

Procedure for Obtaining, Serving, and Enforcing Writ

27-26-201. Application for writ. The writ must be issued upon affidavit, on the application of the party beneficially interested.

History: En. Sec. 384, p. 123, Bannack Stat.; re-en. Sec. 443, p. 224, L. 1867; re-en. Sec. 519, p. 141, Cod. Stat. 1871; re-en. Sec. 549, p. 181, L. 1877; re-en. Sec. 549, 1st Div. Rev. Stat. 1879; re-en. Sec. 567, 1st Div. Comp. Stat. 1887; amd. Sec. 1962, C. Civ. Proc. 1895; re-en. Sec. 7215, Rev. C. 1907; re-en. Sec. 9849, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1086; re-en. Sec. 9849, R.C.M. 1935; R.C.M. 1947, 93-9103(part).

27-26-202. Notice of application. The notice of the application, when given, must be at least 10 days or a shorter time, in the discretion of the court or judge.

History: En. Sec. 386, p. 123, Bannack Stat.; re-en. Sec. 445, p. 224, L. 1867; re-en. Sec. 521, p. 142, Cod. Stat. 1871; re-en. Sec. 551, p. 182, L. 1877; re-en. Sec. 551, 1st Div. Rev. Stat. 1879; re-en. Sec. 569, 1st Div. Comp. Stat. 1887; amd. Sec. 1964, C. Civ. Proc. 1895; re-en. Sec. 7217, Rev. C. 1907; re-en. Sec.

9851, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1088; re-en. Sec. 9851, R.C.M. 1935; R.C.M. 1947, 93-9105(part).

27-26-203. Form and content of writ. The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed and command such party, immediately after the receipt of the writ or at some other specified time, to do the act required to be performed or to show cause before the court, at a specified time and place, why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted and a return day inserted.

History: En. Sec. 385, p. 123, Bannack Stat.; re-en. Sec. 444, p. 224, L. 1867; re-en. Sec. 520, p. 141, Cod. Stat. 1871; re-en. Sec. 550, p. 181, L. 1877; re-en. Sec. 550, 1st Div. Rev. Stat. 1879; re-en. Sec. 568, 1st Div. Comp. Stat. 1887; amd. Sec. 1963, C. Civ. Proc. 1895; re-en. Sec. 7216, Rev. C. 1907; re-en. Sec. 9850, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1087; re-en. Sec. 9850, R.C.M. 1935; R.C.M. 1947, 93-9104.

27-26-204. Factors that determine whether writ peremptory or alternative. When an application to the court or judge is made without notice to the adverse party and the writ be allowed, the alternative must be first issued; but if the application be upon due notice and the writ be allowed, the peremptory may be issued in the first instance.

History: En. Sec. 386, p. 123, Bannack Stat.; re-en. Sec. 445, p. 224, L. 1867; re-en. Sec. 521, p. 142, Cod. Stat. 1871; re-en. Sec. 551, p. 182, L. 1887; re-en. Sec. 551, 1st Div. Rev. Stat. 1879; re-en. Sec. 569, 1st Div. Comp. Stat. 1877; amd. Sec. 1964, C. Civ. Proc. 1895; re-en. Sec. 7217, Rev. C. 1907; re-en. Sec. 9851, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1088; re-en. Sec. 9851, R.C.M. 1935; R.C.M. 1947, 93-9105(part).

27-26-205. Service of writ. The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court or judge. Service upon a majority of the members of any board or body is service upon the board or body, whether at the time of the service the board or body was in session or not.

History: En. Sec. 394, p. 124, Bannack Stat.; re-en. Sec. 453, p. 225, L. 1867; re-en. Sec. 529, p. 143, Cod. Stat. 1871; en. Sec. 559, p. 183, L. 1877; re-en. Sec. 559, 1st Div. Rev. Stat. 1879; re-en. Sec. 577, 1st Div. Comp. Stat. 1887; re-en. Sec. 1972, C. Civ. Proc. 1895; re-en. Sec. 7225, Rev. C. 1907; re-en. Sec. 9859, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1096; re-en. Sec. 9859, R.C.M. 1935; R.C.M. 1947, 93-9113.

27-26-206. Enforcement of writ — penalty. When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the court or judge that any member of such tribunal, corporation, or board or person upon whom the writ has been personally served has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding $1,000. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed and may make any orders necessary and proper for the complete enforcement of the writ.

History: En. Sec. 395, p. 124, Bannack Stat.; re-en. Sec. 454, p. 225, L. 1867; re-en. Sec. 530, p. 143, Cod. Stat. 1871; re-en. Sec. 560, p. 183, L. 1877; re-en. Sec. 560, 1st Div. Rev. Stat. 1879; re-en. Sec. 578, 1st Div. Comp. Stat. 1887; amd. Sec. 1973, C. Civ. Proc. 1895; re-en. Sec. 7226, Rev. C. 1907; re-en. Sec. 9860, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1097; re-en. Sec. 9860, R.C.M. 1935; R.C.M. 1947, 93-9114.

Part 3

Procedure Upon Return of Writ

27-26-301. Time for return and hearing. Writs of mandate issued by the supreme court or by a district court or district judge may, in the discretion of the court issuing the writ, be made returnable and a hearing thereon be heard at any time.

History: En. Sec. 565, p. 185, L. 1877; re-en. Sec. 565, 1st Div. Rev. Stat. 1879; re-en. Sec. 583, 1st Div. comp. Stat. 1887; amd. Sec. 1990, C. Civ. Proc. 1895; re-en. Sec. 7231, Rev. C. 1907; re-en. Sec. 9865, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1108; re-en. Sec. 9865, R.C.M. 1935; R.C.M. 1947, 93-9301(part).

27-26-302. Answer of adverse party. On the return of the alternative or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer, under oath, made in the same manner as an answer to a complaint in a civil action.

History: En. Sec. 387, p. 123, Bannack Stat.; re-en. Sec. 446, p. 224, L. 1867; re-en. Sec. 522, p. 142, Cod. Stat. 1871; re-en. Sec. 552, p. 182, L. 1877; re-en. Sec. 552, 1st Div. Rev. Stat. 1879; re-en. Sec. 570, 1st Div. Comp. Stat. 1887; amd. Sec. 1965, C. Civ. Proc. 1895; re-en. Sec. 7218, Rev. C. 1907; re-en. Sec. 9852, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1089; re-en. Sec. 9852, R.C.M. 1935; R.C.M. 1947, 93-9106.

27-26-303. Jury trial. (1) If an answer be made which raises a question as to a matter of fact essential to the determination of the motion and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court or judge may, in its or his discretion, order the question to be tried before a jury and postpone the argument until such trial can be had. The question to be tried must be distinctly stated in the order for trial. The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him.

(2) If the proceeding is in the district court or before a district judge, the trial must take place as in other cases. If a jury be required in the supreme court, a jury must be drawn and selected from the jury boxes of the county in which the seat of government is located and the clerk of the district court of said county must place such boxes in the custody of the clerk of the supreme court for that purpose. The conduct of the trial shall be the same as in the district court, and the clerk of the supreme court shall have the same authority to issue process, enter orders and judgments as the district clerk has in like cases.

History: En. Sec. 388, p. 123, Bannack Stat.; re-en. Sec. 447, p. 224, L. 1867; re-en. Sec. 523, p. 142, Cod. Stat. 1871; re-en. Sec. 553, p. 182, L. 1877; re-en. Sec. 553, 1st Div. Rev. Stat. 1879; re-en. Sec. 571, 1st Div. Comp. Stat. 1887; en. Sec. 1966, C. Civ. Proc. 1895; re-en. Sec. 7219, Rev. C. 1907; re-en. Sec. 9853, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1090; re-en. Sec. 9853, R.C.M. 1935; R.C.M. 1947, 93-9107.

27-26-304. Applicant's response to answer. On the trial the applicant is not precluded by the answer from any valid objection to its sufficiency and may contradict it by proof, either in direct denial or by way of avoidance.

History: En. Sec. 389, p. 123, Bannack Stat.; re-en. Sec. 448, p. 224, L. 1867; re-en. Sec. 524, p. 142, Cod. Stat. 1871; re-en. Sec. 554, p. 183, L. 1877; re-en. Sec. 554, 1st Div. Rev. Stat. 1879; re-en. Sec. 572, 1st Div. Comp. Stat. 1887; re-en. Sec. 1967, C. Civ. Proc. 1895; re-en. Sec. 7220, Rev. C. 1907; re-en. Sec. 9854, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1091; re-en. Sec. 9854, R.C.M. 1935; R.C.M. 1947, 93-9108.

27-26-305. Motion for new trial. The motion for a new trial must be made in the court in which the issue of fact is tried.

History: En. Sec. 555, p. 183, L. 1877; re-en. Sec. 555, 1st Div. Rev. Stat. 1879; re-en. Sec. 573, 1st Div. Comp. Stat. 1887; re-en. Sec. 1968, C. Civ. Proc. 1895; re-en. Sec. 7221, Rev. C. 1907; re-en. Sec. 9855, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1092; re-en. Sec. 9855, R.C.M. 1935; R.C.M. 1947, 93-9109.

27-26-306. Argument to proceed if no new trial. If no notice of a motion for a new trial be given or, if given, the motion be denied, the argument must proceed at any time the court or judge may direct.

History: En. Sec. 1969, C. Civ. Proc. 1895; re-en. Sec. 7222, Rev. C. 1907; re-en. Sec. 9856, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1093; re-en. Sec. 9856, R.C.M. 1935; R.C.M. 1947, 93-9110.

27-26-307. Procedure when there is no answer or no material issue of fact. If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law or puts in issue immaterial statements not affecting the substantial right of the parties, the court or judge must proceed to hear or fix a day for hearing the argument of the case.

History: En. Sec. 392, p. 124, Bannack Stat.; re-en. Sec. 451, p. 225, L. 1867; re-en. Sec. 527, p. 143, Cod. Stat. 1871; amd. Sec. 557, p. 183, L. 1877; re-en. Sec. 557, 1st Div. Rev. Stat. 1879; re-en. Sec. 575, 1st Div. Comp. Stat. 1887; re-en. Sec. 1970, C. Civ. Proc. 1895; re-en. Sec. 7223, Rev. C. 1907; re-en. Sec. 9857, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1094; re-en. Sec. 9857, R.C.M. 1935; R.C.M. 1947, 93-9111.

Part 4

Judgment

27-26-401. Default not permitted. The writ cannot be granted by default. The case must be heard by the court or judge, whether the adverse party appear or not.

History: En. Sec. 386, p. 123, Bannack Stat.; re-en. Sec. 445, p. 224, L. 1867; re-en. Sec. 521, p. 142, Cod. Stat. 1871; re-en. Sec. 551, p. 182, L. 1877; re-en. Sec. 551, 1st Div. Rev. Stat. 1879; re-en. Sec. 569, 1st Div. Comp. Stat. 1887; amd. Sec. 1964, C. Civ. Proc. 1895; re-en. Sec. 7217, Rev. C. 1907; re-en. Sec. 9851, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1088; re-en. Sec. 9851, R.C.M. 1935; R.C.M. 1947, 93-9105(part).

27-26-402. Judgment for applicant. If judgment be given for the applicant:

(1) he may recover the damages which he has sustained, as found by the jury or as may be determined by the court or referees, upon a reference to be ordered, together with costs;

(2) for such damages and costs, an execution may issue; and

(3) a peremptory mandate must be awarded without delay.

History: En. Sec. 393, p. 124, Bannack Stat.; re-en. Sec. 452, p. 225, L. 1867; re-en. Sec. 528, p. 143, Cod. Stat. 1871; re-en. Sec. 558, p. 183, L. 1877; re-en. Sec. 558, 1st Div. Rev. Stat. 1879; re-en. Sec. 576, 1st Div. Comp. Stat. 1887; re-en. Sec. 1971, C. Civ. Proc. 1895; re-en. Sec. 7224, Rev. C. 1907; re-en. Sec. 9858, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1095; amd. Sec. 1, Ch. 5, L. 1925; re-en. Sec. 9858, R.C.M. 1935; R.C.M. 1947, 93-9112(part).

27-26-403. Officers not to be personally liable. In all cases where the respondent is a state, county, or municipal officer, all damages and costs, or either, which may be recovered or awarded shall be recovered and awarded against the state, county, or municipal corporation represented by such officer and not against such officer so appearing in said proceeding. The same shall be a proper claim against the state or county or municipal corporation for which such officer shall have appeared and shall be paid as other claims against the state, county, or municipality are paid; but in all such cases, the court shall first determine that the officer appeared and made defense in such proceeding in good faith.

History: En. Sec. 393, p. 124, Bannack Stat.; re-en. Sec. 452, p. 225, L. 1867; re-en. Sec. 528, p. 143, Cod. Stat. 1871; re-en. Sec. 558, p. 183, L. 1877; re-en. Sec. 558, 1st Div. Rev. Stat. 1879; re-en. Sec. 576, 1st Div. Comp. Stat. 1887; re-en. Sec. 1971, C. Civ. Proc. 1895; re-en. Sec. 7224, Rev. C. 1907; re-en. Sec. 9858, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1095; amd. Sec. 1, Ch. 5, L. 1925; re-en. Sec. 9858, R.C.M. 1935; R.C.M. 1947, 93-9112(part).

CHAPTER 27

WRIT OF PROHIBITION

Part 1 — General Provisions

Section
27-27-101. Definition and function of writ of prohibition.
27-27-102. Issuance of writ.
27-27-103. Form and content of writ.
27-27-104. Application of procedure governing mandamus.

Part 1

General Provisions

27-27-101. Definition and function of writ of prohibition. The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person.

History: En. Sec. 561, p. 184, L. 1877; re-en. Sec. 561, 1st Div. Rev. Stat. 1879; re-en. Sec. 579, 1st Div. Comp. Stat. 1887; amd. Sec. 1980, C. Civ. Proc. 1895; re-en. Sec. 7227, Rev. C. 1907; re-en. Sec. 9861, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1102; re-en. Sec. 9861, R.C.M. 1935; R.C.M. 1947, 93-9201.

27-27-102. Issuance of writ. The same may be issued by the supreme court or the district court or any district judge to any inferior tribunal or to a corporation, board, or person in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon affidavit on the application of the person beneficially interested.

History: En. Sec. 562, p. 184, L. 1877; re-en. Sec. 562, 1st Div. Rev. Stat. 1879; re-en. Sec. 580, 1st Div. Comp. Stat. 1887; amd. Sec. 1981, C. Civ. Proc. 1895; re-en. Sec. 7228, Rev. C. 1907; re-en. Sec. 9862, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1103; re-en. Sec. 9862, R.C.M. 1935; R.C.M. 1947, 93-9202.

27-27-103. Form and content of writ. The writ must be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed and command such party to desist or refrain from further proceedings in the action or matter specified therein until the further order of the court or judge from which it is issued and to show cause before such court or judge, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted and a return day inserted.

History: En. Sec. 563, p. 184, L. 1877; re-en. Sec. 563, 1st Div. Rev. Stat. 1879; re-en. Sec. 581, 1st Div. Comp. Stat. 1887; re-en. Sec. 1982, C. Civ. Proc. 1895; re-en. Sec. 7229, Rev. C. 1907; re-en. Sec. 9863, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1104; re-en. Sec. 9863, R.C.M. 1935; R.C.M. 1947, 93-9203.

27-27-104. Application of procedure governing mandamus. The provisions of chapter 26, except 27-26-101, 27-26-102, 27-26-201, and 27-26-203, apply to this proceeding.

History: Ap. p. Sec. 564, p. 184, L. 1877; re-en. Sec. 564, 1st Div. Rev. Stat. 1879; re-en. Sec. 582, 1st Div. Comp. Stat. 1887; re-en. Sec. 1983, C. Civ. Proc. 1895; re-en. Sec. 7230, Rev. C. 1907; re-en. Sec. 9864, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1105; re-en. Sec. 9864, R.C.M. 1935; Sec. 93-9204, R.C.M. 1947; Ap. p. Sec. 565, p. 185, L. 1877; re-en. Sec. 565, 1st Div. Rev. Stat. 1879; re-en. Sec. 583, 1st Div. Comp. Stat. 1887; amd. Sec. 1990, C. Civ. Proc. 1895; re-en. Sec. 7231, Rev. C. 1907; re-en. Sec. 9865, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1108; re-en. Sec. 9865, R.C.M. 1935; Sec. 93-9301, R.C.M. 1947; Ap. p. Sec. 2000, C. Civ. Proc. 1895; re-en. Sec. 7232, Rev. C. 1907; re-en. Sec. 9866, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1109; re-en. Sec. 9866, R.C.M. 1935; Sec. 93-9302, R.C.M. 1947; Ap. p. Sec. 2001, C. Civ. Proc. 1895; re-en. Sec. 7233, Rev. C. 1907; re-en. Sec. 9867, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1110; re-en. Sec. 9867, R.C.M. 1935; Sec. 93-9303, R.C.M. 1947; R.C.M. 1947, 93-9204, 93-9301(part), 93-9302(part), 93-9303(part).

CHAPTER 28

QUO WARRANTO

Part 1 — General Provisions

Section

27-28-101. When proceeding may be instituted for unlawful assertion of authority.
27-28-102. When proceeding may be brought against a corporation for misconduct.
27-28-103. When attorney general required to commence an action.
27-28-104. Upon whose relation action brought — security for costs.
27-28-105. Jurisdiction and venue.
27-28-106. Precedence on court calendar.

Part 2 — Procedure in General

27-28-201. Leave to file complaint.
27-28-202. Summons — complaint filed without leave.
27-28-203. Service by publication.
27-28-204. Pleadings.
27-28-205. Judgment — unlawful assertion of authority.
27-28-206. Right to appeal.
27-28-207. Procedure when action brought in supreme court.

Part 3 — Actions by Private Persons for Usurpation of Office

27-28-301. When action may be commenced — undertaking for security.
27-28-302. Contents of complaint.
27-28-303. Who may be made defendants.
27-28-304. Whose rights determined in judgment.
27-28-305. No stay of judgment of ouster pending appeal.
27-28-306. Rights of prevailing party to take office and demand books and papers.
27-28-307. Refusal to turn over books and papers punishable as contempt.
27-28-308. Subsequent action for damages for usurpation.

Part 4 — Actions to Oust Irregularly Elected Corporate Directors

27-28-401. When judgment of ouster rendered.
27-28-402. Court order to hold new election.

Part 5 — Actions Against Corporations

27-28-501. Judgment forbidding continuation of offending acts.
27-28-502. Judgment dissolving corporation.
27-28-503. Costs — judgment against corporation or alleged corporation.
27-28-504. Court appointed trustees to settle affairs of dissolved corporation.
27-28-505. Powers and duties of trustees — liability.
27-28-506. Refusal to deliver assets or papers to trustees — punishment for contempt, liability.

Part 1

General Provisions

27-28-101. When proceeding may be instituted for unlawful assertion of authority. A civil action may be brought in the name of the state against:

(1) a person who usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military, or a franchise within this state or an office in a corporation created by the authority of this state;

(2) a public officer, civil or military, who does or suffers an act which, by the provisions of law, works a forfeiture of his office;

(3) an association of persons who act as a corporation within this state without being legally incorporated.

History: En. Sec. 1410, C. Civ. Proc. 1895; re-en. Sec. 6943, Rev. C. 1907; re-en. Sec. 9576, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 803; re-en. Sec. 9576, R.C.M. 1935; R.C.M. 1947, 93-6401.

27-28-102. When proceeding may be brought against a corporation for misconduct. A like action may be brought against a corporation when it has:

(1) offended against a provision of an act for its creation or renewal or any act altering or amending such acts;

(2) forfeited its privileges and franchises by nonuser;

(3) committed or omitted an act which amounts to a surrender of its corporate rights, privileges, and franchises;

(4) misused a franchise or privilege conferred upon it by law or exercised a franchise or privilege not so conferred.

History: En. Sec. 1411, C. Civ. Proc. 1895; re-en. Sec. 6944, Rev. C. 1907; re-en. Sec. 9577, R.C.M. 1921; re-en. Sec. 9577, R.C.M. 1935; R.C.M. 1947, 93-6402.

27-28-103. When attorney general required to commence an action. The attorney general shall commence an action:

(1) when directed by the governor; and

(2) when, upon complaint or otherwise, he has good reason to believe that any case specified in 27-28-102 can be established by proof.

History: En. Sec. 1412, C. Civ. Proc. 1895; re-en. Sec. 6945, Rev. C. 1907; re-en. Sec. 9578, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 803; re-en. Sec. 9578, R.C.M. 1935; R.C.M. 1947, 93-6403.

27-28-104. Upon whose relation action brought — security for costs. Such officer may, upon his own relation, bring any such action, or he may, on leave of the court or a judge thereof in vacation, bring the action upon the relation of another person; and if the action be brought under 27-28-101(1), he may require security for costs, to be given as in other cases.

History: En. Sec. 1413, C. Civ. Proc. 1895; re-en. Sec. 6946, Rev. C. 1907; re-en. Sec. 9579, R.C.M. 1921; re-en. Sec. 9579, R.C.M. 1935; R.C.M. 1947, 93-6404.

27-28-105. Jurisdiction and venue. An action under this chapter can be brought in the supreme court of the state or in the district court of the county in which the defendant or one of the defendants resides or is found or, when the defendant is a corporation, in the county in which it is situated or has a place of business.

History: En. Sec. 1417, C. Civ. Proc. 1895; re-en. Sec. 6950, Rev. C. 1907; re-en. Sec. 9583, R.C.M. 1921; re-en. Sec. 9583, R.C.M. 1935; R.C.M. 1947, 93-6408.

27-28-106. Precedence on court calendar. Actions under this chapter in any court shall have precedence of any civil business pending therein; and the court, if the matter is of public concern, shall, on the motion of the attorney general or the attorney of the party, require as speedy a trial of the merits of the case as may be consistent with the rights of the parties.

History: En. Sec. 1433, C. Civ. Proc. 1895; re-en. Sec. 6966, Rev. C. 1907; re-en. Sec. 9599, R.C.M. 1921; re-en. Sec. 9599, R.C.M. 1935; R.C.M. 1947, 93-6424.

Part 2

Procedure in General

27-28-201. Leave to file complaint. Upon application for leave to file a complaint, the court or judge may direct notice thereof to be given to the defendant previous to granting such leave and may hear the defendant in opposition thereto; and if leave be granted, an entry thereof shall be made on the minutes of the court or the fact shall be endorsed by the judge on the complaint, which shall then be filed.

History: En. Sec. 1418, C. Civ. Proc. 1895; re-en. Sec. 6951, Rev. C. 1907; re-en. Sec. 9584, R.C.M. 1921; re-en. Sec. 9584, R.C.M. 1935; R.C.M. 1947, 93-6409.

27-28-202. Summons — complaint filed without leave. When the complaint is filed without leave and notice, a summons shall issue and be served as in other cases.

History: En. Sec. 1419, C. Civ. Proc. 1895; re-en. Sec. 6952, Rev. C. 1907; re-en. Sec. 9585, R.C.M. 1921; re-en. Sec. 9585, R.C.M. 1935; R.C.M. 1947, 93-6410.

27-28-203. Service by publication. When a summons is returned not served because the defendant or its officers or office cannot be found within the county, the clerk shall publish the summons as in other cases.

History: En. Sec. 1420, C. Civ. Proc. 1895; re-en. Sec. 6953, Rev. C. 1907; re-en. Sec. 9586, R.C.M. 1921; re-en. Sec. 9586, R.C.M. 1935; R.C.M. 1947, 93-6411.

27-28-204. Pleadings. The pleadings shall be as in other cases.

History: En. Sec. 1421, C. Civ. Proc. 1895; re-en. Sec. 6954, Rev. C. 1907; re-en. Sec. 9587, R.C.M. 1921; re-en. Sec. 9587, R.C.M. 1935; R.C.M. 1947, 93-6412.

27-28-205. Judgment — unlawful assertion of authority. When a defendant is found guilty of usurping, intruding into, or unlawfully holding or exercising an office, franchise, or privilege, judgment shall be rendered that such defendant be ousted and altogether excluded therefrom and that the relator recover his costs.

History: En. Sec. 1422, C. Civ. Proc. 1895; re-en. Sec. 6955, Rev. C. 1907; re-en. Sec. 9588, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 809; re-en. Sec. 9588, R.C.M. 1935; R.C.M. 1947, 93-6413.

27-28-206. Right to appeal. If the action is commenced in the district court, an appeal may be taken from the judgment by either party to the supreme court as in other cases.

History: En. Sec. 1435, C. Civ. Proc. 1895; re-en. Sec. 6968, Rev. C. 1907; re-en. Sec. 9601, R.C.M. 1921; re-en. Sec. 9601, R.C.M. 1935; R.C.M. 1947, 93-6426(part).

27-28-207. Procedure when action brought in supreme court. Actions under this chapter commenced in the supreme court shall be conducted in the same manner as if commenced in the district court, and the clerk of the supreme court shall have the same authority to issue summons and other process and to enter orders and judgments as the clerk of the district court has in like cases. All pleadings and the conduct of the trial shall be the same as in the district court. If a jury is required to determine an issue of fact, a jury shall be drawn and selected from the jury boxes of the county in which the seat of government is located and the clerk of the district court of said county must place such jury boxes in the custody of the clerk of the supreme court for that purpose.

History: En. Sec. 1434, C. Civ. Proc. 1895; re-en. Sec. 6967, Rev. C. 1907; re-en. Sec. 9600, R.C.M. 1921; re-en. Sec. 9600, R.C.M. 1935; R.C.M. 1947, 93-6425.

Part 3

Actions by Private Persons for Usurpation of Office

27-28-301. When action may be commenced — undertaking for security. A person claiming to be entitled to a public office unlawfully held and exercised by another, by himself or by an attorney and counselor at law, may bring an action therefor in the name of the state, as provided in this chapter. On filing the complaint, such person shall enter into an undertaking, with two sufficient sureties to be approved by the judge or any judge of the court in which the action is brought, conditioned that such person will pay any judgment for costs or damages recovered against him and all costs and expenses incurred in the prosecution of the action, which undertaking shall be filed with the clerk of the court.

History: En. Sec. 1414, C. Civ. Proc. 1895; re-en. Sec. 6947, Rev. C. 1907; re-en. Sec. 9580, R.C.M. 1921; re-en. Sec. 9580, R.C.M, 1935; R.C.M. 1947, 93-6405.

27-28-302. Contents of complaint. When the action is against a person for usurping an office, the complaint shall set forth the name of the person who claims to be entitled thereto, with an averment of his right thereto.

History: En. Sec. 1415, C. Civ. Proc. 1895; re-en. Sec. 6948, Rev. C. 1907; re-en. Sec. 9581, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 805; re-en. Sec. 9581, R.C.M. 1935; R.C.M. 1947, 93-6406(part).

27-28-303. Who may be made defendants. All persons who claim to be entitled to the same office or franchise may be made defendants in the same action to try their respective rights to such office or franchise.

History: En. Sec. 1416, C. Civ. Proc. 1895; re-en. Sec. 6949, Rev. C. 1907; re-en. Sec. 9582, R.C.M. 1921; re-en. Sec. 9582, R.C.M. 1935; R.C.M. 1947, 93-6407.

27-28-304. Whose rights determined in judgment. Judgment may be rendered upon the right of the defendant and also upon the right of the person averred to be entitled, as provided in 27-28-302, or only upon the right of the defendant, as justice requires.

History: En. Sec. 1415, C. Civ. Proc. 1895; re-en. Sec. 6948, Rev. C. 1907; re-en. Sec. 9581, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 805; re-en. Sec. 9581, R.C.M. 1935; R.C.M. 1947, 93-6406(part).

27-28-305. No stay of judgment of ouster pending appeal. If there is judgment of ouster against the defendant, there shall be no stay of execution or proceedings pending such appeal.

History: En. Sec. 1435, C. Civ. Proc. 1895; re-en. Sec. 6968, Rev. C. 1907; re-en. Sec. 9601, R.C.M. 1921; re-en. Sec. 9601, R.C.M. 1935; R.C.M. 1947, 93-6426(part).

27-28-306. Rights of prevailing party to take office and demand books and papers. If judgment be rendered in favor of the person averred to be entitled to an office, he may, after taking the oath of office and executing any official bond required by law, take upon him the execution of the office and he shall immediately thereafter demand of the defendant all the books and papers in his custody or within his power appertaining to the office from which he has been ousted.

History: En. Sec. 1425, C. Civ. Proc. 1895; re-en. Sec. 6958, Rev. C. 1907; re-en. Sec. 9591, R.C.M. 1921; re-en. Sec. 9591, R.C.M. 1935; R.C.M. 1947, 93-6416.

27-28-307. Refusal to turn over books and papers punishable as contempt. If such defendant refuse or neglect to deliver over any such book or paper pursuant to such demand, he shall be deemed guilty of a contempt of court and shall be fined in any sum not exceeding $10,000 and imprisoned in the jail of the county until he complies with the order of the court or is otherwise discharged by due course of law.

History: En. Sec. 1427, C. Civ. Proc. 1895; re-en. Sec. 6960, Rev. C. 1907; re-en. Sec. 9593, R.C.M. 1921; re-en. Sec. 9593, R.C.M. 1935; R.C.M. 1947, 93-6418.

27-28-308. Subsequent action for damages for usurpation. The person in whose favor judgment is rendered may, at any time within 1 year after the date of such judgment, bring an action against the party ousted and recover the damages he sustained by reason of such usurpation.

History: En. Sec. 1426, C. Civ. Proc. 1895; re-en. Sec. 6959, Rev. C. 1907; re-en. Sec. 9592, R.C.M. 1921; re-en. Sec. 9592, R.C.M. 1935; R.C.M. 1947, 93-6417.

Part 4

Actions to Oust Irregularly Elected Corporate Directors

27-28-401. When judgment of ouster rendered. When the action is against a director of a corporation and the court finds that at his election either illegal votes were received or legal votes were rejected, or both, sufficient to change the result, judgment may be rendered that the defendant be ousted and of induction in favor of the person who was entitled to be declared elected at such election.

History: En. Sec. 1423, C. Civ. Proc. 1895; re-en. Sec. 6956, Rev. C. 1907; re-en. Sec. 9589, R.C.M. 1921; re-en. Sec. 9589, R.C.M. 1935; R.C.M. 1947, 93-6414.

27-28-402. Court order to hold new election. In a case named in 27-28-401, the court may order a new election to be held, at a time and place and by judges appointed by the court, notice of which election and naming the judges shall be given for the time and in the manner provided by law for notice of elections of directors of such corporation. The order of the court shall become obligatory upon the corporation and its officers when a duly certified copy thereof is served upon its secretary personally or left at its principal office, and the court may enforce its order by attachment or in any other manner it deems necessary.

History: En. Sec. 1424, C. Civ. Proc. 1895; re-en. Sec. 6957, Rev. C. 1907; re-en. Sec. 9590, R.C.M. 1921; re-en. Sec. 9590, R.C.M. 1935; R.C.M. 1947, 93-6415.

Part 5

Actions Against Corporations

27-28-501. Judgment forbidding continuation of offending acts. When it is found and adjudged that a corporation has offended in any matter or manner which does not work such surrender or forfeiture, misused a franchise, or exercised a power not conferred by law, judgment shall be entered that it be ousted from the continuance of such offense or the exercise of such power.

History: En. Sec. 1428, C. Civ. Proc. 1895; re-en. Sec. 6961, Rev. C. 1907; re-en. Sec. 9594, R.C.M. 1921; re-en. Sec. 9594, R.C.M. 1935; R.C.M. 1947, 93-6419(part).

27-28-502. Judgment dissolving corporation. When in any such action it is found and adjudged that a corporation has, by an act done or omitted, surrendered or forfeited its corporate rights, privileges, or franchises or has not used the same during a term of 5 years, judgment shall be entered that it be ousted and excluded therefrom and that it be dissolved.

History: En. Sec. 1428, C. Civ. Proc. 1895; re-en. Sec. 6961, Rev. C. 1907; re-en. Sec. 9594, R.C.M. 1921; re-en. Sec. 9594, R.C.M. 1935; R.C.M. 1947, 93-6419(part).

27-28-503. Costs — judgment against corporation or alleged corporation. If judgment be rendered against a corporation or against a person claiming to be a corporation, the court may render judgment for costs against the directors or other officers of the corporation or against the person claiming to be a corporation.

History: En. Sec. 1432, C. Civ. Proc. 1895; re-en. Sec. 6965, Rev. C. 1907; re-en. Sec. 9598, R.C.M. 1921; re-en. Sec. 9598, R.C.M. 1935; R.C.M. 1947, 93-6423.

27-28-504. Court appointed trustees to settle affairs of dissolved corporation. The court rendering a judgment dissolving a corporation shall appoint trustees of the creditors and stockholders of the corporation, who, after giving an undertaking payable to the state, in such sum and with such sureties as the court may designate and approve, conditioned that they will faithfully discharge their trust and properly pay and apply all money that may come into their hands, shall have power to settle the affairs of the corporation, collect and pay outstanding debts, and divide among the stockholders the money and other property which remain after the payment of debts and necessary expenses.

History: En. Sec. 1429, C. Civ. Proc. 1895; re-en. Sec. 6962, Rev. C. 1907; re-en. Sec. 9595, R.C.M. 1921; re-en. Sec. 9595, R.C.M. 1935; R.C.M. 1947, 93-6420.

27-28-505. Powers and duties of trustees — liability. The trustees shall forthwith demand all money, property, books, deeds, notes, bills, obligations, and papers of every description within the custody, power, or control of the officers of the corporation, or either of them belonging to the corporation or in anywise necessary for the settlement of its affairs or for the discharge of its debts and liabilities; and they may sue for and recover the demands and property of the corporation and shall be jointly and severally liable to the creditors and stockholders to the extent of its property and effects which come into their hands.

History: En. Sec. 1430, C. Civ. Proc. 1895; re-en. Sec. 6963, Rev. C. 1907; re-en. Sec. 9596, R.C.M. 1921; re-en. Sec. 9596, R.C.M. 1935; R.C.M. 1947, 93-6421.

27-28-506. Refusal to deliver assets or papers to trustees — punishment for contempt, liability. An officer of such corporation who refuses or neglects to deliver over any such money or other things pursuant to such demand shall be deemed guilty of a contempt of court and shall be fined not exceeding $10,000 and imprisoned in the jail of the proper county until he complies with the order of the court or is otherwise discharged by due course of law, and he shall be liable to the trustees for the value of all money or other things so refused or neglected to be surrendered, together with all damages that have been sustained by the stockholders and creditors of the corporation, or any of them, in consequence of such neglect or refusal.

History: En. Sec. 1431, C. Civ. Proc. 1895; re-en. Sec. 6964, Rev. C. 1907; re-en. Sec. 9597, R.C.M. 1921; re-en. Sec. 9597, R.C.M. 1935; R.C.M. 1947, 93-6422.

CHAPTER 29

RESERVED

CHAPTER 30

NUISANCES

Part 1 — General Provisions

Section
27-30-101. Definition of nuisance.
27-30-102. Distinction between public and private nuisances.
27-30-103. Action for nuisance.
27-30-104. Right to recover damages unaffected by abatement.
27-30-105. Successive owners liable for nuisance.

Part 2 — Public Nuisances

27-30-201. Public nuisance not legalized by time.
27-30-202. Remedies for public nuisances.
27-30-203. When private person may maintain action for public nuisance.
27-30-204. Abatement of public nuisance by public body or officer or injured party.

Part 3 — Private Nuisances

27-30-301. Remedies for private nuisances.
27-30-302. Abatement of private nuisance by injured party.

Part 1

General Provisions

27-30-101. Definition of nuisance. (1) Anything which is injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or which unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal, or basin or any public park, square, street, or highway is a nuisance.

(2) Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

History: (1)En. Sec. 4550, Civ. C. 1895; re-en. Sec. 6162, Rev. C. 1907; re-en. Sec. 8642, R.C.M. 1921; Cal. Civ. C. Sec. 3479; re-en. Sec. 8642, R.C.M 1935; Sec. 57-101, R.C.M. 1947; (2)En. Sec. 4553, Civ. C. 1895; re-en. Sec. 6165, Rev. C. 1907; re-en. Sec. 8645, R.C.M. 1921; Cal. Civ. C. Sec. 3482; Field Civ. C. Sec. 1952; re-en. Sec. 8645, R.C.M. 1935; Sec. 57-104, R.C.M. 1947; R.C.M. 1947, 57-101, 57-104.

27-30-102. Distinction between public and private nuisances. (1) A public nuisance is one which affects, at the same time, an entire community or neighborhood or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

(2) Every nuisance not included in the definition of subsection (1) is private.

History: (1)En. Sec. 4551, Civ. C. 1895; re-en. Sec. 6163, Rev. C. 1907; re-en. Sec. 8643, R.C.M. 1921; Cal. Civ. C. Sec. 3480; Based on Field Civ. C. Sec. 1950; re-en. Sec. 8643, R.C.M. 1935; Sec. 57-102, R.C.M. 1947; (2)En. Sec. 4552, Civ. C. 1895; re-en. Sec. 6164, Rev. C. 1907; re-en. Sec. 8644, R.C.M. 1921; Cal. Civ. C. Sec. 3481; Field Civ. C. Sec. 1951; re-en. Sec. 8644, R.C.M. 1935; Sec. 57-103, R.C.M. 1947; R.C.M. 1947, 57-102, 57-103.

27-30-103. Action for nuisance. A nuisance is the subject of an action. Such action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

History: En. Sec. 228, p. 91, Bannack Stat.; amd. Sec. 249, p. 187, L. 1867; re-en. Sec. 298, p. 93, Cod. Stat. 1871; re-en. Sec. 349, p. 137, L. 1877; re-en. Sec. 349, 1st Div. Rev. Stat. 1879; re-en. Sec. 361, 1st Div. Comp. Stat. 1887; re-en. Sec. 1300, C. Civ. Proc. 1895; re-en Sec. 6865, Rev. C. 1907; re-en. Sec. 9474, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 731; re-en. Sec. 9474, R.C.M. 1935; R.C.M. 1947, 93-6101(part).

27-30-104. Right to recover damages unaffected by abatement. The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence.

History: En. Sec. 4555, Civ. C. 1895; re-en. Sec. 6167, Rev. C. 1907; re-en. Sec. 8647, R.C.M. 1921; Cal. Civ. C. Sec. 3484; Field Civ. C. Sec. 1954; re-en. Sec. 8647, R.C.M. 1935; R.C.M. 1947, 57-106.

27-30-105. Successive owners liable for nuisance. Every successive owner of property who neglects to abate a continuing nuisance upon or in the use of such property, created by a former owner, is liable therefor in the same manner as the one who first created it.

History: En. Sec. 4554, Civ. C. 1895; re-en. Sec. 6166, Rev. C. 1907; re-en. Sec. 8646, R.C.M. 1921; Cal. Civ. C. Sec. 3483; Field Civ. C. Sec. 1953; re-en. Sec. 8646, R.C.M. 1935; R.C.M. 1947, 57-105.

Part 2

Public Nuisances

27-30-201. Public nuisance not legalized by time. No lapse of time can legalize a public nuisance amounting to an actual obstruction of public right.

History: En. Sec. 4570, Civ. C. 1895; re-en. Sec. 6168, Rev. C. 1907; re-en. Sec. 8648, R.C.M. 1921; Cal. Civ. C. Sec. 3490; Field Civ. C. Sec. 1955; re-en. Sec. 8648, R.C.M. 1935; R.C.M. 1947, 57-107.

27-30-202. Remedies for public nuisances. (1) The remedies against a public nuisance are:

(a) indictment or information;
(b) a civil action; or
(c) abatement.

(2) The remedy by indictment or information is regulated by Titles 45 and 46.

History: (1)En. Sec. 4571, Civ. C. 1895; re-en. Sec. 6169, Rev. C. 1907; re-en. Sec. 8649, R.C.M. 1921; Cal. Civ. C. Sec. 3491; Based on Field Civ. C. Sec. 1956; re-en. Sec. 8649, R.C.M. 1935; Sec. 57-108, R.C.M. 1947; (2)En. Sec. 4572, Civ. C.

1895; re-en. Sec. 6170, Rev. C. 1907; re-en. Sec. 8650, R.C.M. 1921; Cal. Civ. C. Sec. 3492; re-en. Sec. 8650, R.C.M. 1935; Sec. 57-109, R.C.M. 1947; R.C.M. 1947, 57-108, 57-109.

27-30-203. When private person may maintain action for public nuisance. A private person may maintain an action for a public nuisance if it is specially injurious to himself, but not otherwise.

History: En. Sec. 4573, Civ. C. 1895; re-en. Sec. 6171, Rev. C. 1907; re-en. Sec. 8651, R.C.M. 1921; Cal. Civ. C. Sec. 3493; Field Civ. C. Sec. 1958; re-en. Sec. 8651, R.C.M. 1935; R.C.M. 1947, 57-110.

27-30-204. Abatement of public nuisance by public body or officer or injured party. A public nuisance may be abated by any public body or officer authorized thereto by law. Any person may abate a public nuisance which is specially injurious to him by removing or, if necessary, destroying the thing that constitutes the same without committing a breach of the peace or doing unnecessary injury.

History: Ap. p. Sec. 4574, Civ. C. 1895; re-en. Sec. 6172, Rev. C. 1907; re-en. Sec. 8652, R.C.M. 1921; Cal. Civ. C. Sec. 3494; Field Civ. C. Sec. 1959; re-en. Sec. 8652, R.C.M. 1935; Sec. 57-111, R.C.M. 1947; Ap. p. Sec. 4575, Civ. C. 1895; re-en. Sec. 6173, Rev. C. 1907; re-en. Sec. 8653, R.C.M. 1921; Cal. Civ. C. Sec. 3495; Field Civ. C. Sec. 1960; re-en. Sec. 8653, R.C.M. 1935; Sec. 57-112, R.C.M. 1947; R.C.M. 1947, 57-111, 57-112.

Part 3

Private Nuisances

27-30-301. Remedies for private nuisances. The remedies against a private nuisance are:

(1) a civil action; or
(2) abatement.

History: En. Sec. 4590, Civ. C. 1895; re-en. Sec. 6174, Rev. C. 1907; re-en. Sec. 8654, R.C.M. 1921; Cal. Civ. C. Sec. 3501; Field Civ. C. Sec. 1961; re-en. Sec. 8654, R.C.M. 1935; R.C.M. 1947, 57-113.

27-30-302. Abatement of private nuisance by injured party. A person injured by a private nuisance may abate it by removing or, if necessary, destroying the thing which constitutes the nuisance without committing a breach of the peace or doing unnecessary injury. Where a private nuisance results from a mere omission of the wrongdoer and cannot be abated without entering upon his land, reasonable notice must be given to him before entering to abate it.

History: Ap. p. Sec. 4591, Civ. C. 1895; re-en. Sec. 6175, Rev. C. 1907; re-en. Sec. 8655, R.C.M. 1921; Cal. Civ. C. Sec. 3502; Field Civ. C. Sec. 1962; re-en. Sec. 8655, R.C.M. 1935; Sec. 57-114, R.C.M. 1947; Ap. p. Sec. 4592, Civ. C. 1895; re-en. Sec. 6176, Rev. C. 1907; re-en. Sec. 8656, R.C.M. 1921; Cal. Civ. C. Sec. 3503; Field Civ. C. Sec. 1963; re-en. Sec. 8656, R.C.M. 1935; Sec. 57-115, R.C.M. 1947; R.C.M. 1947, 57-114, 57-115.

CHAPTER 31

CHANGE OF NAME

Part 1 — General Provisions

Section
27-31-101. Petition for change of name of natural person.
27-31-102. Petition for change of name of nonprofit corporation.

27-31-103. District court jurisdiction.

Part 2 — Procedure

27-31-201. Order setting hearing date — notice.
27-31-202. Filing of objections to change.
27-31-203. Conduct of hearing.
27-31-204. Court order.
27-31-205. Annual report of name changes by clerk to secretary of state — publication.

Part 1

General Provisions

27-31-101. Petition for change of name of natural person. All applications for change of names must be made to the district court of the county where the person whose name is proposed to be changed resides, by petition signed by such person and, if such person is under 18 years of age, by one of the parents, if living, or if both be dead, then by the guardian, and if there be no guardian, then by some near relative or friend. The petition must specify the place of birth and residence of such person, his or her present name, the name proposed, and the reason for such change of name and must, if neither parent of such person be living, name as far as known to the petitioner the near relatives of such person and their place of residence.

History: En. Sec. 2261, C. Civ. Proc. 1895; re-en. Sec. 7361, Rev. C. 1907; amd. Sec. 1, Ch. 39, L. 1921; re-en. Sec. 9964, R.C.M. 1921; re-en. Sec. 9964, R.C.M. 1935; amd. Sec. 21, Ch. 240, L. 1971; amd. Sec. 33, Ch. 94, L. 1973; amd. Sec. 59, Ch. 535, L. 1975; R.C.M. 1947, 93-100-2(part).

27-31-102. Petition for change of name of nonprofit corporation. Any religious, benevolent, literary, scientific corporation or any corporation bearing or having for its name or using or being known by the name of any benevolent or charitable order or society may, by petition, apply to the district court of the county in which its articles of incorporation were originally filed or in which the property of such corporation is situated for a change of its corporate name. Such petition must be signed by a majority of the directors or trustees of the corporation and must specify the date of the formation of the corporation, the name proposed, and the reason for such change of name. Upon filing such petition on behalf of such corporation, the same proceedings shall be made as upon applications for changes of names of natural persons.

History: En. Sec. 2261, C. Civ. Proc. 1895; re-en. Sec. 7361, Rev. C. 1907; amd. Sec. 1, Ch. 39, L. 1921; re-en. Sec. 9964, R.C.M. 1921; re-en. Sec. 9964, R.C.M. 1935; amd. Sec. 21, Ch. 240, L. 1971; amd. Sec. 33, Ch. 94, L. 1973; amd. Sec. 59, Ch. 535, L. 1975; R.C.M. 1947, 93-100-2(part).

27-31-103. District court jurisdiction. Applications for change of names must be heard and determined by the district court.

History: En. Sec. 2260, C. Civ. Proc. 1895; re-en. Sec. 7360, Rev. C. 1907; re-en. Sec. 9963, R.C.M. 1921; re-en. Sec. 9963, R.C.M. 1935; R.C.M. 1947, 93-100-1.

Part 2

Procedure

27-31-201. Order setting hearing date — notice. When a petition setting out the matters contained in 27-31-101 or 27-31-102 is filed, the court or judge may appoint a time for hearing the petition. Notice of the time and place of hearing the petition must be published for 4 successive weeks in some newspaper published in the county, if a newspaper be printed therein, but if no newspaper be printed in the county, a copy of such notice must be posted in at least three public places in the county for a like period.

History: En. Sec. 2262, C. Civ. Proc. 1895; re-en. Sec. 7362, Rev. C. 1907; amd. Sec. 1, Ch. 7, L. 1911; re-en. Sec. 9965, R.C.M. 1921; re-en. Sec. 9965, R.C.M. 1935; R.C.M. 1947, 93-100-3.

27-31-202. Filing of objections to change. At any time before such hearing, objections may be filed by any person who can, in such objections, show to the court or judge good reasons against such change of name.

History: en. Sec. 2263, C. Civ. Proc. 1895; re-en. Sec. 7363, Rev. C. 1907; amd. Sec. 2, Ch. 7, L. 1911; re-en. Sec. 9966, R.C.M. 1921; re-en. Sec. 9966, R.C.M. 1935; R.C.M. 1947, 93-100-4(part).

27-31-203. Conduct of hearing. On the day set for the hearing of said petition or at any time to which the hearing is continued or postponed, due proof of the publication or posting of the required notice as set out in 27-31-201 being made, such application must be heard. On the hearing the court or judge may examine on oath any of the petitioners, remonstrants, or other persons touching the application.

History: en. Sec. 2263, C. Civ. Proc. 1895; re-en. Sec. 7363, Rev. C. 1907; amd. Sec. 2, Ch. 7, L. 1911; re-en. Sec. 9966, R.C.M. 1921; re-en. Sec. 9966, R.C.M. 1935; R.C.M. 1947, 93-100-4(part).

27-31-204. Court order. The court or judge may make an order changing the name or dismissing the applications, as to the court or judge may seem right and proper.

History: en. Sec. 2263, C. Civ. Proc. 1895; re-en. Sec. 7363, Rev. C. 1907; amd. Sec. 2, Ch. 7, L. 1911; re-en. Sec. 9966, R.C.M. 1921; re-en. Sec. 9966, R.C.M. 1935; R.C.M. 1947, 93-100-4(part).

27-31-205. Annual report of name changes by clerk to secretary of state — publication. Each clerk of the district court shall, annually in the month of January, make a return to the office of secretary of state of all changes of names made in the district court of his county under this chapter. Such return shall show the date of the judgment of the court, original name, name decreed, and residence. Such returns shall be published in a tabular form with the statutes first published thereafter.

History: En. Sec. 2264, C. Civ. Proc. 1895; re-en. Sec. 7364, Rev. C. 1907; re-en. Sec. 9967, R.C.M. 1921; re-en. Sec. 9967, R.C.M. 1935; R.C.M. 1947, 93-100-5.

CHAPTER 32

JUDICIAL DETERMINATION OF BIRTH DATE

Part 1 — General Provisions

Petition for Determination

Section
27-32-101. Who may petition — where petition filed.

27-32-102. Contents of petition.
27-32-103. Exclusive jurisdiction of district courts.
27-32-104. Fees.

Part 2 — Preliminary Procedure—Hearing

27-32-201. Order setting hearing date — notice.
27-32-202. Objections to granting of petition.
27-32-203. Conduct of hearing.
27-32-204. Transfer of proceeding to proper county.

Part 3 — Judgment—Appeal

27-32-301. Judgment.
27-32-302. Clerk to certify and file judgment.
27-32-303. Appeal.

Part 1

General Provisions
Petition for Determination

27-32-101. Who may petition — where petition filed. For the purpose of having a judicial determination of the date of birth, any citizen of the United States, either natural born or naturalized, may file with the clerk of the district court of the county of his residence a petition.

History: En. Sec. 1, Ch. 16, L. 1943; R.C.M. 1947, 93-101-1(part).

27-32-102. Contents of petition. The petition must be duly verified by the petitioner and must contain the following:

(1) The petition must state:

(a) that the petitioner is a citizen of the United States;

(b) that he has resided in the state of Montana for 1 year last past and in the county in which the action is brought for at least 90 days immediately preceding the commencement of the action;

(c) the place of his birth;

(d) the names of his parents, together with the place of the birth of each of his parents and their address, if they are living;

(e) the name and address of each of his brothers and sisters;

(f) if the address of either of the parents or of any of the brothers or sisters is not known, then their last known place of address.

(2) If the petitioner was born outside of the United States, then the petition must state:

(a) whether his parents came to the United States and, if so, where they came and where they resided or reside;

(b) whether they or either of them were naturalized within the United States and, if so, when and where such naturalization took place.

History: En. Sec. 1, Ch. 16, L. 1943; R.C.M. 1947, 93-101-1(part).

27-32-103. Exclusive jurisdiction of district courts. The district courts of this state shall have exclusive jurisdiction to hear and determine all petitions hereunder.

History: En. Sec. 6, Ch. 16, L. 1943; R.C.M. 1947, 93-101-6(part).

27-32-104. Fees. The petitioner, upon the filing of the petition, must pay to the clerk of court a fee of $1, and upon the entry of judgment the applicant must pay to the clerk of court an additional fee of $1. No charge shall be made for posting of the notices required hereunder. If the applicant shall provide a true copy of the judgment rendered, then the clerk of court must certify the same without additional charge.

History: En. Sec. 4, Ch. 16, L. 1943; amd. Sec. 105, Ch. 349, L. 1974; R.C.M. 1947, 93-101-4(part).

Part 2

Preliminary Procedure — Hearing

27-32-201. Order setting hearing date — notice. Upon the filing of this petition with the clerk of the district court, an order shall be made by the court or judge thereof fixing the date of the hearing of the petition and directing that notice of such hearing be given as in such order set forth. Notice shall be given by posting in three public places within the county for a period of not less than 10 or more than 30 days, as the court, in its discretion, shall determine.

History: En. Sec. 2, Ch. 16, L. 1943; R.C.M. 1947, 93-101-2(part).

27-32-202. Objections to granting of petition. Any citizen of the United States may appear and object to the granting of such petition, but all such objections shall be made in writing.

History: En. Sec. 2, Ch. 16, L. 1943; R.C.M. 1947, 93-101-2(part).

27-32-203. Conduct of hearing. At the time fixed for the hearing of such petition, the petitioner must appear and testify. Upon the hearing thereof, affidavits shall be received in evidence and shall have the same force and effect as if the testimony had been taken by deposition.

History: En. Sec. 3, Ch. 16, L. 1943; R.C.M. 1947, 93-101-3(part).

27-32-204. Transfer of proceeding to proper county. If upon the hearing of the petition it shall appear that the petitioner is entitled to have judgment entered as herein provided but that the petition has been filed in the wrong county, then the court shall, by appropriate order, direct that the proceeding be transferred to the proper county.

History: En. Sec. 5, Ch. 16, L. 1943; R.C.M. 1947, 93-101-5.

Part 3

Judgment — Appeal

27-32-301. Judgment. If the court shall be satisfied by competent evidence of the sufficiency of the petition that the applicant is a citizen of the United States, that he has been a citizen of the state of Montana for 1 year last past and of the county for more than 90 days preceding the filing of the petition, and that the applicant's date of birth is proven, then the court shall render judgment accordingly and that judgment shall constitute conclusive evidence of the date of the birth of the applicant.

History: En. Sec. 3, Ch. 16, L. 1943; R.C.M. 1947, 93-101-3(part).

27-32-302. Clerk to certify and file judgment. The clerk of the court shall certify to two copies of such judgment and file one with the department of health and environmental sciences, Helena, and the other with the county clerk and recorder of the county in which the judgment was obtained.

History: En. Sec. 4, Ch. 16, L. 1943; amd. Sec. 105, Ch. 349, L. 1974; R.C.M. 1947, 93-101-4(part).

27-32-303. Appeal. Any citizen may appeal from the judgment rendered the same as in civil actions.

History: En. Sec. 6, Ch. 16, L. 1943; R.C.M. 1947, 93-101-6(part).

TITLE 28

CONTRACTS AND OTHER OBLIGATIONS

Ch.
1. Obligations in General.
2. Contracts.
3. Interpretation of Contracts.
Chapters 4 through 9 reserved.
10. Agency.
11. Guaranty, Indemnity, and Suretyship.

CHAPTER 1

OBLIGATIONS IN GENERAL

Part 1 — General Provisions

Section
28-1-101. Definitions.
28-1-102. How obligations arise.
28-1-103. What rules govern interpretation of contracts and other obligations.
28-1-104. Relief from forfeiture.

Part 2 — Obligations Imposed by Law

28-1-201. General duty of care.
28-1-202. Obligation of one who unilaterally decides to render service.
28-1-203. Enforcement of obligations arising by operation of law.

Part 3 — Joint Obligations

28-1-301. Types of obligations involving several persons.
28-1-302. Joint obligations and convenants to be taken as joint and several.
28-1-303. Right to contribution from joint debtors.

Part 4 — Conditional Obligations

28-1-401. What obligations are conditional.
28-1-402. Types of conditions.
28-1-403. Condition precedent defined.
28-1-404. Condition concurrent defined.
28-1-405. Condition subsequent defined.
28-1-406. What conditions must be performed before requiring performance by another.
28-1-407. When prior performance of conditions excused.
28-1-408. Condition involving forfeiture to be strictly construed.

Part 5 — Alternative Obligations

28-1-501. Who may select between alternative performances.
28-1-502. How right of selection lost.
28-1-503. One alternative to be selected in its entirety.
28-1-504. When obligation to be interpreted as though there were a single alternative.

Parts 6 through 9 reserved

Part 10 — Transfer of Rights and Duties under Obligation

28-1-1001. Rights arising out of obligation transferable.
28-1-1002. When burden of obligation may be transferred.

Part 11 — Extinction of Obligation by Performance

28-1-1101. Extinction of obligation by full performance.
28-1-1102. Performance by one of several joint debtors.
28-1-1103. Performance to one of several joint creditors.
28-1-1104. Extinction when directions of creditor followed.
28-1-1105. When partial performance extinguishes part of obligation.
28-1-1106. Application of performance when there are several obligations.
Sections 28-1-1107 through 28-1-1110 reserved.
28-1-1111. Receipt for money, instrument, or property delivered.
28-1-1112. Objections to tender — waiver.
28-1-1113. Creditor's retention of thing which he refuses to accept.

Part 12 — Extinction of Obligation by Offer of Performance

28-1-1201. When obligation extinguished by offer of performance.
28-1-1202. Effect of offer.
28-1-1203. Offer of partial performance ineffective.
28-1-1204. Who must make offer of performance.
28-1-1205. To whom offer must be made.
28-1-1206. Where offer may be made.
28-1-1207. When offer must be made.
28-1-1208. Offer of late performance with compensation.
28-1-1209. Offer to be made in good faith.
28-1-1210. Offeror to be able and willing to perform.
28-1-1211. When offer may be conditional.
28-1-1212. Objections to mode of offer — waiver.
Sections 28-1-1213 through 28-1-1220 reserved.
28-1-1221. Title to thing offered.
28-1-1222. Production of thing to be delivered.
28-1-1223. Thing offered to be kept separate.
28-1-1224. Custody of thing other than money.
28-1-1225. Deposit of money offered in payment.

Part 13 — Prevention of Performance

28-1-1301. When delay or failure to perform or offer to perform excused.
28-1-1302. Effect when performance prevented by creditor.
28-1-1303. Effect when performance prevented by other causes.
28-1-1304. Effect of refusal to accept performance before offer.

Part 14 — Accord and Satisfaction

28-1-1401. Accord — definition and effect.
28-1-1402. Satisfaction — definition and effect.
28-1-1403. When part performance extinguishes obligation.

Part 15 — Novation

28-1-1501. Novation defined.
28-1-1502. Kinds of novation.
28-1-1503. How novation accomplished.
28-1-1504. When acceptance of novation may be rescinded.

Part 16 — Release of Debtor by Creditor

28-1-1601. Extinction of obligation by a release.
28-1-1602. What claims survive general release.
28-1-1603. Effect of release of some but not all joint debtors.

Part 1

General Provisions

28-1-101. Definitions. (1) An obligation is a legal duty by which a person is bound to do or not to do a certain thing.

(2) Performance of an obligation for the delivery of money only is called payment.

History: En. Secs. 1920, 2005, Civ. C. 1895; re-en. Secs. 4892, 4927, Rev. C. 1907; re-en. Secs. 7394, 7429, R.C.M. 1921; Cal. Civ. C. Secs. 1427, 1478; Field Civ. C. Secs. 670, 704; re-en. Secs. 7394, 7429, R.C.M. 1935; R.C.M. 1947, 58-101, 58-406.

28-1-102. How obligations arise. An obligation arises either from:

(1) the contract of the parties; or

(2) the operation of law.

History: En. Sec. 1921, Civ. C. 1895; re-en. Sec. 4893, Rev. C. 1907; re-en. Sec. 7395, R.C.M. 1921; Cal. Civ. C. Sec. 1428; Based on Field Civ. C. Sec. 671; re-en. Sec. 7395, R.C.M. 1935; R.C.M. 1947, 58-102(part).

28-1-103. What rules govern interpretation of contracts and other obligations. The rules which govern the interpretation of contracts are prescribed by chapters 2 and 3 of this title, 1-4-202 through 1-4-205, and 39-2-705. Other obligations are interpreted by the same rules by which statutes of a similar nature are interpreted.

History: En. Sec. 1930, Civ. C. 1895; re-en. Sec. 4894, Rev. C. 1907; re-en. Sec. 7396, R.C.M. 1921; Cal. Civ. C. Sec. 1429; Field Civ. C. Sec. 672; re-en. Sec. 7396, R.C.M. 1935; R.C.M. 1947, 58-103.

28-1-104. Relief from forfeiture. Whenever by the terms of an obligation a party thereto incurs a forfeiture or a loss in the nature of a forfeiture by reason of his failure to comply with its provisions, he may be relieved therefrom upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.

History: En. Sec. 4261, Civ. C. 1895; re-en. Sec. 6039, Rev. C. 1907; re-en. Sec. 8658, R.C.M. 1921; Cal. Civ. C. Sec. 3275; re-en. Sec. 8658, R.C.M. 1935; R.C.M. 1947, 17-102.

Part 2

Obligations Imposed by Law

28-1-201. General duty of care. Every person is bound, without contract, to abstain from injuring the person or property of another or infringing upon any of his rights.

History: En. Sec. 2290, Civ. C. 1895; re-en. Sec. 5071, Rev. C. 1907; re-en. Sec. 7573, R.C.M. 1921; Cal. Civ. C. Sec. 1708; Field Civ. C. Sec. 847; re-en. Sec. 7573, R.C.M. 1935; R.C.M. 1947, 58-601.

28-1-202. Obligation of one who unilaterally decides to render service. One who officiously and without the consent of the real or apparent owner of a thing takes it into his possession for the purpose of rendering service about it must complete such service and use ordinary care, diligence, and reasonable skill about the same. He is not entitled to any compensation for his service or expenses, except that he may deduct actual and necessary expenses incurred by him about such service from any profits which his service has caused the thing to acquire for its owner and must account to the owner for the residue.

History: En. Sec. 2760, Civ. C. 1895; re-en. Sec. 5295, Rev. C. 1907; re-en. Sec. 7810, R.C.M. 1921; Cal. Civ. C. Sec. 2078; Field Civ. C. Sec. 1083; re-en. Sec. 7810, R.C.M. 1935; R.C.M. 1947, 41-501.

28-1-203. Enforcement of obligations arising by operation of law. An obligation arising from operation of law may be enforced by civil action or proceeding or in the manner provided by law.

History: En. Sec. 1921, Civ. C. 1895; re-en. Sec. 4893, Rev. C. 1907; re-en. Sec. 7395, R.C.M. 1921; Cal. Civ. C. Sec. 1428; Based on Field Civ. C. Sec. 671; re-en. Sec. 7395, R.C.M. 1935; R.C.M. 1947, 58-102(part).

Part 3

Joint Obligations

28-1-301. Types of obligations involving several persons. An obligation imposed upon several persons or a right created in favor of several persons may be:

(1) joint;
(2) several; or
(3) joint and several.

History: En. Sec. 1940, Civ. C. 1895; re-en. Sec. 4895, Rev. C. 1907; re-en. Sec. 7397, R.C.M. 1921; Cal. Civ. C. Sec. 1430; Field Civ. C. Sec. 673; re-en. Sec. 7397, R.C.M. 1935; R.C.M. 1947, 58-201.

28-1-302. Joint obligations and covenants to be taken as joint and several. After March 1, 1895, all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants.

History: En. Sec. 1941, Civ. C. 1895; re-en. Sec. 4896, Rev. C. 1907; re-en. Sec. 4896, Rev. C. 1907; re-en. Sec. 7398, R.C.M. 1921; Cal. Civ. C. Sec. 1431; re-en. Sec. 7398, R.C.M. 1935; R.C.M. 1947, 58-202.

28-1-303. Right to contribution from joint debtors. A party to a joint or joint and several obligation who satisfies more than his share of the claim against all may require a proportionate contribution from all the parties joined with him.

History: En. Sec. 1942, Civ. C. 1895; re-en. Sec. 4897; Rev. C. 1907; re-en. Sec. 7399, R.C.M. 1921; Cal. Civ. C. Sec. 1432; Field Civ. C. Sec. 675; re-en. Sec. 7399, R.C.M. 1935; R.C.M. 1947, 58-203.

Part 4

Conditional Obligations

28-1-401. What obligations are conditional. An obligation is conditional when the rights or duties of any party thereto depend upon the occurrence of an uncertain event.

History: En. Sec. 1950, Civ. C. 1895; re-en. Sec. 4898, Rev. C. 1907; re-en. Sec. 7400, R.C.M. 1921; Cal. Civ. C. Sec. 1434; Field Civ. C. Sec. 676; re-en. Sec. 7400, R.C.M. 1935; R.C.M. 1947, 58-204.

28-1-402. Types of conditions. Conditions may be precedent, concurrent, or subsequent.

History: En. Sec. 1951, Civ. C. 1895; re-en. Sec. 4899, Rev. C. 1907; re-en. Sec. 7401, R.C.M. 1921; Cal. Civ. C. Sec. 1435; Field Civ. C. Sec. 677; re-en. Sec. 7401, R.C.M. 1935; R.C.M. 1947, 58-205.

28-1-403. Condition precedent defined. A condition precedent is one which is to be performed before some right dependent thereon accrues or some act dependent thereon is performed.

History: En. Sec. 1952, Civ. C. 1895; re-en. Sec. 4900, Rev. C. 1907; re-en. Sec. 7402, R.C.M. 1921; Cal. Civ. C. Sec. 1436; Field Civ. C. Sec. 678; re-en. Sec. 7402, R.C.M. 1935; R.C.M. 1947, 58-206.

28-1-404. Condition concurrent defined. Conditions concurrent are those which are mutually dependent and are to be performed at the same time.

History: En. Sec. 1953, Civ. C. 1895; re-en. Sec. 4901, Rev. C. 1907; re-en. Sec. 7403, R.C.M. 1921; Cal. Civ. C. Sec. 1437; Field Civ. C. Sec. 679; re-en. Sec. 7403, R.C.M. 1935; R.C.M. 1947, 58-207.

28-1-405. Condition subsequent defined. A condition subsequent is one referring to a future event upon the happening of which the obligation becomes no longer binding upon the other party if he chooses to avail himself of the condition.

History: En. Sec. 1954, Civ. C. 1895; re-en. Sec. 4902, Rev. C. 1907; re-en. Sec. 7404, R.C.M. 1921; Cal. Civ. C. Sec. 1438; Field Civ. C. Sec. 680; re-en. Sec. 7404, R.C.M. 1935; R.C.M. 1947, 58-208.

28-1-406. What conditions must be performed before requiring performance by another. Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party, except as provided by 28-1-407.

History: En. Sec. 1955, Civ. C. 1895; re-en. Sec. 4903, Rev. C. 1907; re-en. Sec. 7405, R.C.M. 1921; Cal. Civ. C. Sec. 1439; Field Civ. C. Sec. 681; re-en. Sec. 7405, R.C.M. 1935; R.C.M. 1947, 58-209.

28-1-407. When prior performance of conditions excused. If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former.

History: En. Sec. 1956, Civ. C. 1895; re-en. Sec. 4904, Rev. C. 1907; re-en. Sec. 7406, R.C.M. 1921; Cal. Civ. C. Sec. 1440; Field Civ. C. Sec. 682; re-en. Sec. 7406, R.C.M. 1935; R.C.M. 1947, 58-210.

28-1-408. Condition involving forfeiture to be strictly construed. A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created.

History: En. Sec. 1958, Civ. C. 1895; re-en. Sec. 4906, Rev. C. 1907; re-en. Sec. 7408, R.C.M. 1921; Cal. Civ. C. Sec. 1442; Field Civ. C. Sec. 684; re-en. Sec. 7408, R.C.M. 1935; R.C.M. 1947, 58-212.

Part 5

Alternative Obligations

28-1-501. Who may select between alternative performances. If an obligation requires the performance of one of two acts in the alternative, the party required to perform has the right of selection unless it is otherwise provided by the terms of the obligation.

History: En. Sec. 1970, Civ. C. 1895; re-en. Sec. 4907, Rev. C. 1907; re-en. Sec. 7409, R.C.M. 1921; Cal. Civ. C. Sec. 1448; Field Civ. C. Sec. 685; re-en. Sec. 7409, R.C.M. 1935; R.C.M. 1947, 58-213.

28-1-502. How right of selection lost. If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party.

History: En. Sec. 1971, Civ. C. 1895; re-en. Sec. 4908, Rev. C. 1907; re-en. Sec. 7410, R.C.M. 1921; Cal. Civ. C. Sec. 1449; Field Civ. C. Sec. 686; re-en. Sec. 7410, R.C.M. 1935; R.C.M. 1947, 58-214.

28-1-503. One alternative to be selected in its entirety. The party having the right of selection between alternative acts must select one of them in its entirety and cannot select part of one and part of another without the consent of the other party.

History: En. Sec. 1972, Civ. C. 1895; re-en. Sec. 4909, Rev. C. 1907; re-en. Sec. 7411, R.C.M. 1921; Cal. Civ. C. Sec. 1450; Field Civ. C. Sec. 687; re-en. Sec. 7411, R.C.M. 1935; R.C.M. 1947, 58-215.

28-1-504. When obligation to be interpreted as though there were a single alternative. If one of the alternative acts required by an obligation is such as the law will not enforce or becomes unlawful or impossible of performance, the obligation is to be interpreted as though the other stood alone.

History: En. Sec. 1973, Civ. C. 1895; re-en. Sec. 4910, Rev. C. 1907; re-en. Sec. 7412, R.C.M. 1921; Cal. Civ. C. Sec. 1451; Field Civ. C. Sec. 688; re-en. Sec. 7412, R.C.M. 1935; R.C.M. 1947, 58-216.

Parts 6 through 9 reserved

Part 10

Transfer of Rights and Duties under Obligation

28-1-1001. Rights arising out of obligation transferable. A right arising out of an obligation is the property of the person to whom it is due and may be transferred as such.

History: En. Sec. 1981, Civ. C. 1895; re-en. Sec. 4912, Rev. C. 1907; re-en. Sec. 7414, R.C.M. 1921; Cal. Civ. C. Sec. 1458; Field Civ. C. Sec. 690; re-en. Sec. 7414, R.C.M. 1935; R.C.M. 1947, 58-302.

28-1-1002. When burden of obligation may be transferred. The burden of an obligation may be transferred with the consent of the party entitled to its benefits, but not otherwise, except as provided by 70-17-205.

History: En. Sec. 1980, Civ. C. 1895; re-en. Sec. 4911, Rev. C. 1907; re-en. Sec. 7413, R.C.M. 1921; Cal. Civ. C. Sec. 1457; Field Civ. C. Sec. 689; re-en. Sec. 7413, R.C.M. 1935; R.C.M. 1947, 58-301.

Part 11

Extinction of Obligation by Performance

28-1-1101. Extinction of obligation by full performance. Full performance of an obligation by the party whose duty it is to perform it or by any other person on his behalf and with his assent, if accepted by the creditor, extinguishes it.

History: En. Sec. 2000, Civ. C. 1895; re-en. Sec. 4922, Rev. C. 1907; re-en. Sec. 7424, R.C.M. 1921; Cal. Civ. C. Sec. 1473; Field Civ. C. Sec. 699; re-en. Sec. 7424, R.C.M. 1935; R.C.M. 1947, 58-401.

28-1-1102. Performance by one of several joint debtors. Performance of an obligation by one of several persons who are jointly liable under it extinguishes the liability of all.

History: En. Sec. 2001, Civ. C. 1895; re-en. Sec. 4923, Rev. C. 1907; re-en. Sec. 7425, R.C.M. 1921; Cal. Civ. C. Sec. 1474; Field Civ. C. Sec. 700; re-en. Sec. 7425, R.C.M. 1935; R.C.M. 1947, 58-402.

28-1-1103. Performance to one of several joint creditors. An obligation in favor of several persons is extinguished by performance rendered to any of them, except in the case of a deposit made by owners in common or in joint ownership, which is regulated by Title 70, chapters 5 and 6 and part 5 of chapter 9, and Title 71, chapter 3, part 14.

History: En. Sec. 2002, Civ. C. 1895; re-en. Sec. 4924, Rev. C. 1907; re-en. Sec. 7426, R.C.M. 1921; Cal. Civ. C. Sec. 1475; Field Civ. C. Sec. 701; re-en. Sec. 7426, R.C.M. 1935; R.C.M. 1947, 58-403.

28-1-1104. Extinction when directions of creditor followed. If a creditor or any one of two or more joint creditors at any time directs the debtor to perform his obligations in a particular manner, the obligation is extinguished by performance in that manner even though the creditor does not receive the benefit of such performance.

History: En. Sec. 2003, Civ. C. 1895; re-en. Sec. 4925, Rev. C. 1907; re-en. Sec. 7427, R.C.M. 1921; Cal. Civ. C. Sec. 1476; Field Civ. C. Sec. 702; re-en. Sec. 7427, R.C.M. 1935; R.C.M. 1947, 58-404.

28-1-1105. When partial performance extinguishes part of obligation. Partial performance of an indivisible obligation extinguishes a corresponding proportion thereof if the benefit of such performance is voluntarily retained by the creditor, but not otherwise. If such partial performance is of such a nature that the creditor cannot avoid retaining it without injuring his own property, his retention thereof is not presumed to be voluntary.

History: En. Sec. 2004, Civ. C. 1895; re-en. Sec. 4926, Rev. C. 1907; re-en. Sec. 7428, R.C.M. 1921; Cal. Civ. C. Sec. 1477; Field Civ. C. Sec. 703; re-en. Sec. 7428, R.C.M. 1935; R.C.M. 1947, 58-405.

28-1-1106. Application of performance when there are several obligations. Where a debtor under several obligations to another does an act by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied as follows:

(1) If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation be manifested to the creditor, it must be so applied.

(2) If no such application be then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation performance of which was due to him from the debtor at the time of such performance, except that if similar obligations were due to him, both individually and as a trustee, he must, unless otherwise directed by the debtor, apply the performance to the extinction of all such obligations in equal proportion, and an application once made by the creditor cannot be rescinded without the consent of the debtor.

(3) If neither party makes such application within the time prescribed herein, the performance must be applied to the extinction of obligations in the following order and, if there be more than one obligation of a particular class, to the extinction of all in that class, ratably:

(a) first—of interest due at the time of the performance;
(b) second—of principal due at that time;
(c) third—of the obligation earliest in date of maturity;
(d) fourth—of an obligation not secured by a lien or collateral undertaking;
(e) fifth—of an obligation secured by a lien or collateral undertaking.

History: En. Sec. 2006, Civ. C. 1895; re-en. Sec. 4928, Rev. C. 1907; re-en. Sec. 7430, R.C.M. 1921; Cal. Civ. C. Sec. 1479; Based on Field Civ. C. Sec. 705; re-en. Sec. 7430, R.C.M. 1935; R.C.M. 1947, 58-407.

28-1-1107 through 28-1-1110 reserved.

28-1-1111. Receipt for money, instrument, or property delivered. (1) Whoever pays money or delivers an instrument or property is entitled to a receipt therefor from the person to whom the payment or delivery is made and may demand a proper signature to such receipt as a condition of the payment or delivery.

(2) A debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation.

History: (1)En. Sec. 3411, C. Civ. Proc. 1895; re-en. Sec. 8037, Rev. C. 1907; re-en. Sec. 10681, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2075; re-en. Sec. 10681, R.C.M. 1935; Sec. 93-2201-2, R.C.M. 1947; (2)En. Sec. 2034, Civ. C. 1895; re-en. Sec. 4943, Rev. C. 1907; re-en. Sec. 7445, R.C.M. 1921; Cal. Civ. C. Sec. 1499; Field Civ. C. Sec. 720; re-en. Sec. 7445, R.C.M. 1935; Sec. 58-422, R.C.M. 1947; R.C.M. 1947, 58-422, 93-2201-2.

28-1-1112. Objections to tender — waiver. The person to whom a tender is made must at the time specify any objection he may have to the money, instrument, or property or he must be deemed to have waived it; and if the objections be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires or be precluded from objecting afterward.

History: En. Sec. 3412, C. Civ. Proc. 1895; re-en. Sec. 8038, Rev. C. 1907; re-en. Sec. 10682, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2076; re-en. Sec. 10682, R.C.M. 1935; R.C.M. 1947, 93-2201-3.

28-1-1113. Creditor's retention of thing which he refuses to accept. If anything is given to a creditor by way of performance, which he refuses to accept as such, he is not bound to return it without demand but, if he retains it, he is a gratuitous depositary thereof.

History: En. Sec. 2040, Civ. C. 1895; re-en. Sec. 4949, Rev. C. 1907; re-en. Sec. 7451, R.C.M. 1921; Cal. Civ. C. Sec. 1505; Field Civ. C. Sec. 726; re-en. Sec. 7451, R.C.M. 1935; R.C.M. 1947, 58-428.

Part 12

Extinction of Obligation by Offer of Performance

28-1-1201. When obligation extinguished by offer of performance. An obligation is extinguished by an offer of performance made in conformity to the rules prescribed in this part and with intent to extinguish the obligation.

History: En. Sec. 2020, Civ. C. 1895; re-en. Sec. 4929, Rev. C. 1907; re-en. Sec. 7431, R.C.M. 1921; Cal. Civ. C. Sec. 1485; Field Civ. C. Sec. 706; re-en. Sec. 7431, R.C.M. 1935; R.C.M. 1947, 58-408.

28-1-1202. Effect of offer. (1) An offer in writing to pay a particular sum of money or to deliver a written instrument or specific personal property is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.

(2) An offer of payment or other performance duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation and has the same effect upon all incidents as a performance thereof.

History: (1)En. Sec. 3410, C. Civ. Proc. 1895; re-en. Sec. 8036, Rev. C. 1907; re-en. Sec. 10680, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2074; re-en. Sec. 10680, R.C.M. 1935; Sec. 93-2201-1, R.C.M. 1947; (2)En. Sec. 2039, Civ. C. 1895; re-en. Sec. 4948, Rev. C. 1907; re-en. Sec. 7450, R.C.M. 1921; Cal. Civ. C. Sec. 1504; Field Civ. C. Sec. 725; re-en. Sec. 7450, R.C.M. 1935; Sec. 58-427, R.C.M. 1947; R.C.M. 1947, 58-427, 93-2201-1.

28-1-1203. Offer of partial performance ineffective. An offer of partial performance is of no effect.

History: En. Sec. 2021, Civ. C. 1895; re-en. Sec. 4930, Rev. C. 1907; re-en. Sec. 7432, R.C.M. 1921; Cal. Civ. C. Sec. 1486; Field Civ. C. Sec. 707; re-en. Sec. 7432, R.C.M. 1935; R.C.M. 1947, 58-409.

28-1-1204. Who must make offer of performance. An offer of performance must be made by the debtor or by some person on his behalf and with his assent.

History: En. Sec. 2022, Civ. C. 1895; re-en. Sec. 4931, Rev. C. 1907; re-en. Sec. 7433, R.C.M. 1921; Cal. Civ. C. Sec. 1487; Field Civ. C. Sec. 708; re-en. Sec. 7433, R.C.M. 1935; R.C.M. 1947, 58-410.

28-1-1205. To whom offer must be made. An offer of performance must be made to the creditor, to any one or two or more joint creditors, or to a person authorized by one or more of them to receive or collect what is due under the obligation if such creditor or authorized person is present at the place where the offer may be made and, if not, wherever the creditor may be found.

History: En. Sec. 2023, Civ. C. 1895; re-en. Sec. 4932, Rev. C. 1907; re-en. Sec. 7434, R.C.M. 1921; Cal. Civ. C. Sec. 1488; Based on Field Civ. C. Sec. 709; re-en. Sec. 7434, R.C.M. 1935; R.C.M. 1947, 58-411.

28-1-1206. Where offer may be made. In the absence of an express provision to the contrary, an offer of performance may be made, at the option of the debtor:

(1) at any place appointed by the creditor;

(2) wherever the person to whom the offer ought to be made can be found;

(3) if such person cannot, with reasonable diligence, be found within the state and within a reasonable distance from his residence or place of business or if he evades the debtor, then at his residence or place of business if the same can, with reasonable diligence, be found within the state; or

(4) if this cannot be done, then at any place within this state.

History: En. Sec. 2024, Civ. C. 1895; re-en. Sec. 4933, Rev. C. 1907; re-en. Sec. 7435, R.C.M. 1921; Cal. Civ. C. Sec. 1489; Field Civ. C. Sec. 710; re-en. Sec. 7435, R.C.M. 1935; R.C.M. 1947, 58-412.

28-1-1207. When offer must be made. (1) Where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before or afterwards.

(2) Where an obligation does not fix the time for its performance, an offer of performance may be made at any time before the debtor, upon reasonable demand, has refused to perform.

History: (1)En. Sec. 2025, Civ. C. 1895; re-en. Sec. 4934, Rev. C. 1907; re-en. Sec. 7436, R.C.M. 1921; Cal. Civ. C. Sec. 1490; Field Civ. C. Sec. 711; re-en. Sec. 7436, R.C.M. 1935; Sec. 58-413, R.C.M. 1947; (2)En. Sec. 2026, Civ. C. 1895; re-en. Sec. 4935, Rev. C. 1907; re-en. Sec. 7437, R.C.M. 1921; Cal. Civ. C. Sec. 1491; Field Civ. C. Sec. 712; re-en. Sec. 7437, R.C.M. 1935; Sec. 58-414, R.C.M. 1947; R.C.M. 1947, 58-413, 58-414.

28-1-1208. Offer of late performance with compensation. Where delay in performance is capable of exact and entire compensation and time has not been expressly declared to be of the essence of the obligation, an offer of performance accompanied with an offer of such compensation may be made at any time after it is due, but without prejudice to any rights acquired by the creditor or by any other person in the meantime.

History: En. Sec. 2027, Civ. C. 1895; re-en. Sec. 4936, Rev. C. 1907; re-en. Sec. 7438, R.C.M. 1921; Cal. Civ. C. Sec. 1492; Field Civ. C. Sec. 713; re-en. Sec. 7438, R.C.M. 1935; R.C.M. 1947, 58-415.

28-1-1209. Offer to be made in good faith. An offer of performance must be made in good faith and in such manner as is most likely, under the circumstances, to benefit the creditor.

History: En. Sec. 2028, Civ. C. 1895; re-en. Sec. 4937, Rev. C. 1907; re-en. Sec. 7439, R.C.M. 1921; Cal. Civ. C. Sec. 1493; Field Civ. C. Sec. 714; re-en. Sec. 7439, R.C.M. 1935; R.C.M. 1947, 58-416.

28-1-1210. Offeror to be able and willing to perform. An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer.

History: En. Sec. 2030, Civ. C. 1895; re-en. Sec. 4939, Rev. C. 1907; re-en. Sec. 7441, R.C.M. 1921; Cal. Civ. C. Sec. 1495; Field Civ. C. Sec. 716; re-en. Sec. 7441, R.C.M. 1935; R.C.M. 1947, 58-418.

28-1-1211. When offer may be conditional. (1) An offer of performance must be free from any conditions which the creditor is not bound, on his part, to perform.

(2) When a debtor is entitled to the performance of a condition precedent to or concurrent with performance on his part, he may make his offer depend upon the due performance of such condition.

History: En. Secs. 2029, 2033, Civ. C. 1895; re-en. Secs. 4938, 4942, Rev. C. 1907; re-en. Secs. 7440, 7444, R.C.M. 1921; Cal. Civ. C. Secs. 1494, 1498; Field Civ. C. Secs. 715, 719; re-en. Secs. 7440, 7444, R.C.M. 1935; R.C.M. 1947, 58-417, 58-421.

28-1-1212. Objections to mode of offer — waiver. All objections to the mode of an offer of performance which the creditor has an opportunity to state at the time to the person making the offer and which could be then obviated by him are waived by the creditor if not then stated.

History: En. Sec. 2036, Civ. C. 1895; re-en. Sec. 4945, Rev. C. 1907; re-en. Sec. 7447, R.C.M. 1921; Cal. Civ. C. Sec. 1501; Field Civ. C. Sec. 722; re-en. Sec. 7447, R.C.M. 1935; R.C.M. 1947, 58-424.

28-1-1213 through 28-1-1220 reserved.

28-1-1221. Title to thing offered. The title to a thing duly offered in performance of an obligation passes to the creditor if the debtor at the time signifies his intention to that effect.

History: En. Sec. 2037, Civ. C. 1895; re-en. Sec. 4946, Rev. C. 1907; re-en. Sec. 7448, R.C.M. 1921; Cal. Civ. C. Sec. 1502; Field Civ. C. Sec. 723; re-en. Sec. 7448, R.C.M. 1935; R.C.M. 1947, 58-425.

28-1-1222. Production of thing to be delivered. The thing to be delivered, if any, need not in any case be actually produced upon an offer of performance unless the offer is accepted.

History: En. Sec. 2031, Civ. C. 1895; re-en. Sec. 4940, Rev. C. 1907; re-en. Sec. 7442, R.C.M. 1921; Cal. Civ. C. Sec. 1496; Field Civ. C. Sec. 717; re-en. Sec. 7442, R.C.M. 1935; R.C.M. 1947, 58-419.

28-1-1223. Thing offered to be kept separate. A thing, when offered by way of performance, must not be mixed with other things from which it cannot be separated immediately and without difficulty.

History: En. Sec. 2032, Civ. C. 1895; re-en. Sec. 4941, Rev. C. 1907; re-en. Sec. 7443, R.C.M. 1921; Cal. Civ. C. Sec. 1497; Field Civ. C. Sec. 718; re-en. Sec. 7443, R.C.M. 1935; R.C.M. 1947, 58-420.

28-1-1224. Custody of thing other than money. The person offering a thing other than money by way of performance must, if he means to treat it as belonging to the creditor, retain it as a depositary for hire until the creditor accepts it or until he has given reasonable notice to the creditor that he will retain it no longer and, if with reasonable diligence he can find a suitable depositary therefor, until he has deposited it with such person.

History: En. Sec. 2038, Civ. C. 1895; re-en. Sec. 4947, Rev. C. 1907; re-en. Sec. 7449, R.C.M. 1921; Cal. Civ. C. Sec. 1503; Field Civ. C. Sec. 724; re-en. Sec. 7449, R.C.M. 1935; R.C.M. 1947, 58-426.

28-1-1225. Deposit of money offered in payment. An obligation for the payment of money is extinguished by a due offer of payment if the amount is immediately deposited in the name of the creditor with some bank of deposit within this state of good repute and notice thereof is given to the creditor.

History: En. Sec. 2035, Civ. C. 1895; re-en. Sec. 4944, Rev. C. 1907; re-en. Sec. 7446, R.C.M. 1921; Cal. Civ. C. Sec. 1500; Field Civ. C. Sec. 721; re-en. Sec. 7446, R.C.M. 1935; R.C.M. 1947, 58-423.

Part 13

Prevention of Performance

28-1-1301. When delay or failure to perform or offer to perform excused. The want of performance of an obligation or of an offer of performance, in whole or in part, or any delay therein is excused by the following causes, to the extent to which they operate:

(1) when such performance or offer is prevented or delayed by the act of the creditor or by the operation of law, even though there may have been a stipulation that this shall not be an excuse;

(2) when it is prevented or delayed by an irresistible, superhuman cause or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary; or

(3) when the debtor is induced not to make it by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time.

History: En. Sec. 2050, Civ. C. 1895; re-en. Sec. 4950, Rev. C. 1907; re-en. Sec. 7452, R.C.M. 1921; Cal. Civ. C. Sec. 1511; Field Civ. C. Sec. 727; re-en. Sec. 7452, R.C.M. 1935; R.C.M. 1947, 58-429.

28-1-1302. Effect when performance prevented by creditor. If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties.

History: En. Sec. 2051, Civ. C. 1895; re-en. Sec. 4951, Rev. C. 1907; re-en. Sec. 7453, R.C.M. 1921; Cal. Civ. C. Sec. 1512; Field Civ. C. Sec. 728; re-en. Sec. 7453, R.C.M. 1935; R.C.M. 1947, 58-430.

28-1-1303. Effect when performance prevented by other causes. If performance of an obligation is prevented by any cause excusing performance other than the act of the creditor, the debtor is entitled to a ratable proportion of the consideration to which he would have been entitled upon full performance, according to the benefit which the creditor receives from the actual performance.

History: En. Sec. 2052, Civ. C. 1895; re-en. Sec. 4952, Rev. C. 1907; re-en. Sec. 7454, R.C.M. 1921; Cal. Civ. C. Sec. 1514; re-en. Sec. 7454, R.C.M. 1935; R.C.M. 1947, 58-431.

28-1-1304. Effect of refusal to accept performance before offer. A refusal by a creditor to accept performance, made before an offer thereof, is equivalent to an offer and refusal unless, before performance is actually due, he gives notice to the debtor of his willingness to accept it.

History: En. Sec. 2053, Civ. C. 1895; re-en. Sec. 4953, Rev. C. 1907; re-en. Sec. 7455, R.C.M. 1921; Cal. Civ. C. Sec. 1515; Field Civ. C. Sec. 731; re-en. Sec. 7455, R.C.M. 1935; R.C.M. 1947, 58-432.

Part 14

Accord and Satisfaction

28-1-1401. Accord — definition and effect. An accord is an agreement to accept in extinction of an obligation something different from or less than that to which the person agreeing to accept is entitled. Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed.

History: Ap. p. Sec. 2060, Civ. C. 1895; re-en. Sec. 4954, Rev. C. 1907; re-en. Sec. 7456, R.C.M. 1921; Cal. Civ. C. Sec. 1521; Based on Field Civ. C. Sec. 732; re-en. Sec. 7456, R.C.M. 1935; Sec. 58-501, R.C.M. 1947; Ap. p. Sec. 2061, Civ. C. 1895; re-en. Sec. 4955, Rev. C. 1907; re-en. Sec. 7457, R.C.M. 1921; Cal. Civ. C. Sec. 1522; Field Civ. C. Sec. 733; re-en. Sec. 7457, R.C.M. 1935; Sec. 58-502, R.C.M. 1947; R.C.M. 1947, 58-501, 58-502.

28-1-1402. Satisfaction — definition and effect. Acceptance by the creditor of the consideration of an accord extinguishes the obligation and is called satisfaction.

History: En. Sec. 2062, Civ. C. 1895; re-en. Sec. 4956, Rev. C. 1907; re-en. Sec. 7458, R.C.M. 1921; Cal. Civ. C. Sec. 1523; Field Civ. C. Sec. 734; re-en. Sec. 7458, R.C.M. 1935; R.C.M. 1947, 58-503.

28-1-1403. When part performance extinguishes obligation. Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing in satisfaction or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation.

History: En. Sec. 2063, Civ. C. 1895; re-en. Sec. 4957, Rev. C. 1907; re-en. Sec. 7459, R.C.M. 1921; Cal. Civ. C. Sec. 1524; re-en. Sec. 7459, R.C.M. 1935; R.C.M. 1947, 58-504.

Part 15

Novation

28-1-1501. Novation defined. "Novation" is the substitution of a new obligation for an existing one.

History: En. Sec. 2070, Civ. C. 1895; re-en. Sec. 4958, Rev. C. 1907; re-en. Sec. 7460, R.C.M. 1921; Cal. Civ. C. Sec. 1530; Field Civ. C. Sec. 736; re-en. Sec. 7460, R.C.M. 1935; R.C.M. 1947, 58-505.

28-1-1502. Kinds of novation. Novation is made by the substitution of:

(1) a new obligation between the same parties with intent to extinguish the old obligation;

(2) a new debtor in place of the old one with intent to release the latter; or

(3) a new creditor in place of the old one with intent to transfer the rights of the latter to the former.

History: En. Sec. 2071, Civ. C. 1895; re-en. Sec. 4959, Rev. C. 1907; re-en. Sec. 7461, R.C.M. 1921; Cal. Civ. C. Sec. 1531; Field Civ. C. Sec. 737; re-en. Sec. 7461, R.C.M. 1935; R.C.M. 1947, 58-506.

28-1-1503. How novation accomplished. Novation is made by contract and is subject to all the rules concerning contracts in general.

History: En. Sec. 2072, Civ. C. 1895; re-en. Sec. 4960, Rev. C. 1907; re-en. Sec. 7462, R.C.M. 1921; Cal. Civ. C. Sec. 1532; Field Civ. C. Sec. 738; re-en. Sec. 7462, R.C.M. 1935; R.C.M. 1947, 58-507.

28-1-1504. When acceptance of novation may be rescinded. When the obligation of a third person or an order upon such person is accepted in satisfaction, the creditor may rescind such acceptance if:

(1) the debtor prevents such person from complying with the order or from fulfilling the obligation;

(2) at the time the obligation or order is received, such person is insolvent and the fact is unknown to the creditor; or

(3) before the creditor can, with reasonable diligence, present the order to the person upon whom it is given, he becomes insolvent.

History: En. Sec. 2073, Civ. C. 1895; re-en. Sec. 4961, Rev. C. 1907; re-en. Sec. 7463, R.C.M. 1921; Cal. Civ. C. Sec. 1533; Based on Field Civ. C. Sec. 740; re-en. Sec. 7463, R.C.M. 1935; R.C.M. 1947, 58-508.

Part 16

Release of Debtor by Creditor

28-1-1601. Extinction of obligation by a release. An obligation is extinguished by a release therefrom given to the debtor by the creditor upon a new consideration or in writing, with or without new consideration.

History: En. Sec. 2080, Civ. C. 1895; re-en. Sec. 4962, Rev. C. 1907; re-en. Sec. 7464, R.C.M. 1921; Cal. Civ. C. Sec. 1541; Based on Field Civ. C. Sec. 741; re-en. Sec. 7464, R.C.M. 1935; R.C.M. 1947, 58-509.

28-1-1602. What claims survive general release. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which, if known by him, must have materially affected his settlement with the debtor.

History: En. Sec. 2081, Civ. C. 1895; re-en. Sec. 4963, Rev. C. 1907; re-en. Sec. 7465, R.C.M. 1921; Cal. Civ. C. Sec. 1542; Based on Field Civ. C. Sec. 742; re-en. Sec. 7465, R.C.M. 1935; R.C.M. 1947, 58-510.

28-1-1603. Effect of release of some but not all joint debtors. A release of one of two or more joint debtors does not extinguish the obligation of any of the others unless they are mere guarantors, nor does it affect their rights to contribution from him.

History: En. Sec. 2082, Civ. C. 1895; re-en. Sec. 4964, Rev. C. 1907; re-en. Sec. 7466, R.C.M. 1921; Cal. Civ. C. Sec. 1543; Field Civ. C. Sec. 743; re-en. Sec. 7466, R.C.M. 1935; R.C.M. 1947, 58-511.

CHAPTER 2

CONTRACTS

Part 1 — General Provisions

Section

28-2-101. Contract defined.
28-2-102. Essential elements of a contract.

28-2-103. Express versus implied contracts.
28-2-104. Executed versus executory contracts.

Part 2 — Parties

28-2-201. Who may contract.
28-2-202. Contracts of persons entirely without understanding.
28-2-203. Contracts of persons with limited understanding.
28-2-204. When person of unsound mind cannot disaffirm contract.
28-2-205. When contract for benefit of third person may be enforced by him.
28-2-206. Assignment of nonnegotiable written contract.

Part 3 — Consent in General

28-2-301. Essential characteristics of consent.
28-2-302. Effect of consent which is not free.
28-2-303. When consent is mutual.
28-2-304. Ratification of contract void for want of consent.

Part 4 — Circumstances Which Affect Validity of Apparent Consent

28-2-401. When apparent consent not free.
28-2-402. What constitutes duress.
28-2-403. What constitutes menace.
28-2-404. Kinds of fraud.
28-2-405. What constitutes actual fraud.
28-2-406. What constitutes constructive fraud.
28-2-407. What constitutes undue influence.
28-2-408. Kinds of mistake.
28-2-409. What constitutes mistake of fact.
28-2-410. What constitutes mistake of law.
28-2-411. Mistake of foreign laws — mistake of fact.

Part 5 — Communication of Consent Revocation of Proposal

28-2-501. How consent is communicated.
28-2-502. When consent is considered fully communicated.
28-2-503. Implied acceptance.
28-2-504. Acceptance to be absolute.
Sections 28-2-505 through 28-2-510 reserved.
28-2-511. When proposal may be revoked.
28-2-512. How proposal revoked.

Part 6 — Object of a Contract

28-2-601. Object of contract defined.
28-2-602. Essential characteristics of object.
28-2-603. When contract wholly void.
28-2-604. When contract partially void.

Part 7 — Illegal Objects and Provisions

28-2-701. What is unlawful.
28-2-702. Contracts which violate policy of the law — exemption from responsibility.
28-2-703. Contracts in restraint of trade generally void.
28-2-704. Exception — sale of goodwill of business.
28-2-705. Exception — dissolution of partnership.
28-2-706. Contracts in restraint of marriage generally void.
28-2-707. What conditions void.
28-2-708. Restraints upon legal proceedings void.

28-2-709. Illegality of agreement to allow another person to confess judgment, accept service of process, or accept default.
Sections 28-2-710 through 28-2-720 reserved.
28-2-721. When provision fixing liquidated damages valid.
28-2-722. Contracts for personal services limited to two years.

Part 8 — Consideration

28-2-801. What constitutes good consideration.
28-2-802. Extent to which existing legal or moral obligation is good consideration.
28-2-803. Consideration to be lawful — effect of illegality.
28-2-804. Written instrument presumptive evidence of consideration.
28-2-805. Burden of proof of want of consideration.
Sections 28-2-806 through 28-2-810 reserved.
28-2-811. Applicability of rules concerning object to executory consideration.
28-2-812. How amount of executory consideration may be determined.
28-2-813. Determination by interested party.
28-2-814. Effect of impossibility of designated exclusive method of determination.

Part 9 — Written Contracts

28-2-901. When contracts may be oral.
28-2-902. Enforcement of contract not in writing through fraud.
28-2-903. What contracts must be in writing.
28-2-904. Effect of written contract on oral agreements.
28-2-905. When extrinsic evidence concerning a written agreement may be considered.
28-2-906. When written contract takes effect.
28-2-907. Applicability of rules concerning transfers in general.

Parts 10 through 14 reserved

Part 15 — Enforcement of Contracts

28-2-1501. When successive actions on same contract permitted.

Part 16 — Modification of Contracts

28-2-1601. Alteration of oral contract by parties.
28-2-1602. How written contract may be altered by parties.
Sections 28-2-1603 through 28-2-1610 reserved.
28-2-1611. When written contract may be revised by court.
28-2-1612. Presumption that parties intended equitable agreement.
28-2-1613. Scope of court's inquiry.
28-2-1614. Specific enforcement of revised contract.

Part 17 — Extinction of Contracts—Rescission

28-2-1701. How contract extinguished.
28-2-1702. Extinction of written contract by destruction or cancellation.
28-2-1703. Extinction of executory obligations of contract by destruction, cancellation, or alteration.
Sections 28-2-1704 through 28-2-1710 reserved.
28-2-1711. When party may rescind.
28-2-1712. When stipulation against rescission ineffective.
28-2-1713. How rescission accomplished.
28-2-1714. When rescission may be adjudged.
28-2-1715. When rescission may be adjudged for mistake.
28-2-1716. Power of court to require party rescinding to do equity.

Part 1

General Provisions

28-2-101. Contract defined. A contract is an agreement to do or not to do a certain thing.

History: En. Sec. 2090, Civ. C. 1895; re-en. Sec. 4965, Rev. C. 1907; re-en. Sec. 7467, R.C.M. 1921; Cal. Civ. C. Sec. 1549; Field Civ. C. Sec. 744; re-en. Sec. 7467, R.C.M. 1935; R.C.M. 1947, 13-101.

28-2-102. Essential elements of a contract. (1) It is essential to the existence of a contract that there should be:

(a) parties capable of contracting;
(b) their consent;
(c) a lawful object; and
(d) a sufficient cause or consideration.

(2) It is essential to the validity of a contract not only that the parties should exist but that it should be possible to identify them.

History: En. Secs. 2091, 2102, Civ. C. 1895; re-en. Secs. 4966, 4969, Rev. C. 1907; re-en. Secs. 7468, 7471, R.C.M. 1921; Cal. Civ. C. Secs. 1550, 1558; Field Civ. C. Secs. 745, 748; re-en. Secs. 7468, 7471, R.C.M. 1935; R.C.M. 1947, 13-102, 13-203.

28-2-103. Express versus implied contracts. A contract is either express or implied. An express contract is one the terms of which are stated in words. An implied contract is one the existence and terms of which are manifested by conduct.

History: En. Secs. 2180, 2181, 2182, Civ. C. 1895; re-en. Secs. 5012, 5013, 5014, Rev. C. 1907; re-en. Secs. 7514, 7515, 7516, R.C.M. 1921; Cal. Civ. C. Secs. 1619, 1620, 1621; Field Civ. C. Secs. 789, 790, 791; re-en. Secs. 7514, 7515, 7516, R.C.M. 1935; R.C.M. 1947, 13-601, 13-602, 13-603.

28-2-104. Executed versus executory contracts. An executed contract is one the object of which is fully performed. All others are executory.

History: En. Sec. 2226, Civ. C. 1895; re-en. Sec. 5050, Rev. C. 1907; re-en. Sec. 7552, R.C.M. 1921; Cal. Civ. C. Sec. 1661; Field Civ. C. Sec. 826; re-en. Sec. 7552, R.C.M. 1935; R.C.M. 1947, 13-727.

Part 2

Parties

28-2-201. Who may contract. All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights. Minors and persons of unsound mind have only such capacity as is defined by 27-1-511, 27-1-711, 28-2-202 through 28-2-204, 28-10-104, and Title 41, chapter 1, parts 1 through 3, except 41-1-303.

History: En. Secs. 2100, 2101, Civ. C. 1895; re-en. Secs. 4967, 4968, Rev. C. 1907; re-en. Secs. 7469, 7470, R.C.M. 1921; Cal. Civ. C. Secs. 1556, 1557; Field Civ. C. Secs. 746, 747; re-en. Secs. 7469, 7470, R.C.M. 1935; R.C.M. 1947, 13-201, 13-202.

28-2-202. Contracts of persons entirely without understanding. A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family.

History: En. Sec. 21, Civ. C. 1895; re-en. Sec. 3595, Rev. C. 1907; re-en. Sec. 5683, R.C.M. 1921; Cal. Civ. C. Sec. 38; re-en. Sec. 5683, R.C.M. 1935; re-en. Sec. 5683, R.C.M. 1935; R.C.M. 1947, 64-110.

28-2-203. Contracts of persons with limited understanding. A conveyance or other contract of a person of unsound mind but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission as provided in part 17 of this chapter.

History: En. Sec. 22, Civ. C. 1895; re-en. Sec. 3596, Rev. C. 1907; re-en. Sec. 5684, R.C.M. 1921; Cal. Civ. C. Sec. 39; Field Civ. C. Sec. 21; re-en. Sec. 5684, R.C.M. 1935; R.C.M. 1947, 64-111.

28-2-204. When person of unsound mind cannot disaffirm contract. A person of unsound mind cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them.

History: En. Sec. 19, Civ. C. 1895; re-en. Sec. 3593, Rev. C. 1907; re-en. Sec. 5681, R.C.M. 1921; Cal. Civ. C. Sec. 36; Field Civ. C. Sec. 18; re-en. Sec. 5681, R.C.M. 1935; R.C.M. 1947, 64-108(part).

28-2-205. When contract for benefit of third person may be enforced by him. A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.

History: En. Sec. 2103, Civ. C. 1895; re-en. Sec. 4970, Rev. C. 1907; re-en. Sec. 7472, R.C.M. 1921; Cal. Civ. C. Sec. 1559; Field Civ. C. Sec. 749; re-en. Sec. 7472, R.C.M. 1935; R.C.M. 1947, 13-204.

28-2-206. Assignment of nonnegotiable written contract. A nonnegotiable written contract for the payment of money or personal property may be transferred by endorsement in like manner with negotiable instruments. Such endorsement shall transfer all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the endorsement.

History: En. Sec. 1982, Civ. C. 1895; re-en. Sec. 4913, Rev. C. 1907; re-en. Sec. 7415, R.C.M. 1921; Cal. Civ. C. Sec. 1459; re-en. Sec. 7415, R.C.M. 1935; R.C.M. 1947, 58-303.

Part 3

Consent in General

28-2-301. Essential characteristics of consent. The consent of the parties to a contract must be:

(1) free;
(2) mutual; and
(3) communicated by each to the other.

History: En. Sec. 2110, Civ. C. 1895; re-en. Sec. 4971, Rev. C. 1907; re-en. Sec. 7473, R.C.M. 1921; Cal. Civ. C. Sec. 1565; Field Civ. C. Sec. 750; re-en. Sec. 7473, R.C.M. 1935; R.C.M. 1947, 13-301.

28-2-302. Effect of consent which is not free. A consent which is not free is nevertheless not absolutely void but may be rescinded by the parties in the manner prescribed by part 17 of this chapter.

History: En. Sec. 2111, Civ. C. 1895; re-en. Sec. 4972, Rev. C. 1907; re-en. Sec. 7474, R.C.M. 1921; Cal. Civ. C. Sec. 1566; Field Civ. C. Sec. 751; re-en. Sec. 7474, R.C.M. 1935; R.C.M. 1947, 13-302.

28-2-303. When consent is mutual. Consent is not mutual unless the parties all agree upon the same thing in the same sense, but in certain cases defined by chapter 3, they are to be deemed so to agree without regard to the fact.

History: En. Sec. 2125, Civ. C. 1895; re-en. Sec. 4986, Rev. C. 1907; re-en. Sec. 7488, R.C.M. 1921; Cal. Civ. C. Sec. 1580; Field Civ. C. Sec. 765; re-en. Sec. 7488, R.C.M. 1935; R.C.M. 1947, 13-316.

28-2-304. Ratification of contract void for want of consent. A contract which is voidable solely for want of due consent may be ratified by a subsequent consent.

History: En. Sec. 2133, Civ. C. 1895; re-en. Sec. 4994, Rev. C. 1907; re-en. Sec. 7496, R.C.M. 1921; Cal. Civ. C. Sec. 1588; Field Civ. C. Sec. 773; re-en. Sec. 7496, R.C.M. 1935; R.C.M. 1947, 13-324.

Part 4

Circumstances Which Affect Validity of Apparent Consent

28-2-401. When apparent consent not free. (1) An apparent consent is not real or free when obtained through:

(a) duress;
(b) menace;
(c) fraud;
(d) undue influence; or
(e) mistake.

(2) Consent is deemed to have been obtained through one of the causes mentioned in subsection (1) only when it would not have been given had such cause not existed.

History: En. Secs. 2112, 2113, Civ. C. 1895; re-en. Secs. 4973, 4974, Rev. C. 1907; re-en. Secs. 7475, 7476, R.C.M. 1921; Cal. Civ. C. Secs. 1567, 1568; Field Civ. C. Secs. 752, 753; re-en. Secs. 7475, 7476, R.C.M. 1935; R.C.M. 1947, 13-303, 13-304.

28-2-402. What constitutes duress. Duress consists in:

(1) unlawful confinement of the person of the party, of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife;

(2) unlawful detention of the property of any such person; or

(3) confinement of such person, lawful in form but fraudulently obtained or fraudulently made unjustly harassing or oppressive.

History: En. Sec. 2114, Civ. C. 1895; re-en. Sec. 4975, Rev. C. 1907; re-en. Sec. 7477, R.C.M. 1921; Cal. Civ. C. Sec. 1569; Field Civ. C. Sec. 754; re-en. Sec. 7477, R.C.M. 1935; R.C.M. 1947, 13-305.

28-2-403. What constitutes menace. Menace consists in a threat of:

(1) such duress as is specified in subsections (1) and (3) of 28-2-402;

(2) unlawful and violent injury to the person or property of any such person as is specified in 28-2-402; or

(3) injury to the character of any such person.

History: En. Sec. 2115, Civ. C. 1895; re-en. Sec. 4976, Rev. C. 1907; re-en. Sec. 7478, R.C.M. 1921; Cal. Civ. C. Sec. 1570; Field Civ. C. Sec. 755; re-en. Sec. 7478, R.C.M. 1935; R.C.M. 1947, 13-306.

28-2-404. Kinds of fraud. Fraud is either actual or constructive. Actual fraud is always a question of fact.

History: En. Secs. 2116, 2119, Civ. C. 1895; re-en. Secs. 4977, 4980, Rev. C. 1907; re-en. Secs. 7479, 7482, R.C.M. 1921; Cal. Civ. C. Secs. 1571, 1574; Field Civ. C. Secs. 756, 759; re-en. Secs. 7479, 7482, R.C.M. 1935; R.C.M. 1947, 13-307, 13-310.

28-2-405. What constitutes actual fraud. Actual fraud, within the meaning of this part, consists in any of the following acts committed by a party to the contract or with his connivance with intent to deceive another party thereto or to induce him to enter into the contract:

(1) the suggestion as a fact of that which is not true by one who does not believe it to be true;

(2) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(3) the suppression of that which is true by one having knowledge or belief of the fact;

(4) a promise made without any intention of performing it; or

(5) any other act fitted to deceive.

History: En. Sec. 2117, Civ. C. 1895; re-en. Sec. 4978, Rev. C. 1907; re-en. Sec. 7480, R.C.M. 1921; Cal. Civ. C. Sec. 1572; Field Civ. C. Sec. 757; re-en. Sec. 7480, R.C.M. 1935; R.C.M. 1947, 13-308.

28-2-406. What constitutes constructive fraud. Constructive fraud consists in:

(1) any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault or anyone claiming under him by misleading another to his prejudice or to the prejudice of anyone claiming under him; or

(2) any such act or omission as the law especially declares to be fraudulent, without respect to actual fraud.

History: En. Sec. 2118, Civ. C. 1895; re-en. Sec. 4979, Rev. C. 1907; re-en. Sec. 7481, R.C.M. 1921; Cal. Civ. C. Sec. 1573; Field Civ. C. Sec. 758; re-en. Sec. 7481, R.C.M. 1935; R.C.M. 1947, 13-309.

28-2-407. What constitutes undue influence. Undue influence consists in:

(1) the use by one in whom a confidence is reposed by another or who holds a real or apparent authority over him of such confidence or authority for the purpose of obtaining an unfair advantage over him;

(2) taking an unfair advantage of another's weakness of mind; or

(3) taking a grossly oppressive and unfair advantage of another's necessities or distress.

History: En. Sec. 2120, Civ. C. 1895; re-en. Sec. 4981, Rev. C. 1907; re-en. Sec. 7483, R.C.M. 1921; Cal. Civ. C. Sec. 1575; Field Civ. C. Sec. 760; re-en. Sec. 7483, R.C.M. 1935; R.C.M. 1947, 13-311.

28-2-408. Kinds of mistake. Mistake may be either of fact or law.

History: En. Sec. 2121, Civ. C. 1895; re-en. Sec. 4982, Rev. C. 1907; re-en. Sec. 7484, R.C.M. 1921; Cal. Civ. C. Sec. 1576; Field Civ. C. Sec. 761; re-en. Sec. 7484, R.C.M. 1935; R.C.M. 1947, 13-312.

28-2-409. What constitutes mistake of fact. Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake and consisting in:

(1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or

(2) belief in the present existence of a thing material to the contract which does not exist or in the past existence of such a thing which has not existed.

History: En. Sec. 2122, Civ. C. 1895; re-en. Sec. 4983, Rev. C. 1907; re-en. Sec. 7485, R.C.M. 1921; Cal. Civ. C. Sec. 1577; Field Civ. C. Sec. 762; re-en. Sec. 7485, R.C.M. 1935; R.C.M. 1947, 13-313.

28-2-410. What constitutes mistake of law. Mistake of law constitutes a mistake, within the meaning of this part, only when it arises from:

(1) a misapprehension of the law by all parties, all supposing that they knew and understood it and all making substantially the same mistake as to the law; or

(2) a misapprehension of the law by one party of which the others are aware at the time of contracting but which they do not rectify.

History: En. Sec. 2123, Civ. C. 1895; re-en. Sec. 4984, Rev. C. 1907; re-en. Sec. 7486, R.C.M. 1921; Cal. Civ. C. Sec. 1578; Field Civ. C. Sec. 763; re-en. Sec. 7486, R.C.M. 1935; R.C.M. 1947, 13-314.

28-2-411. Mistake of foreign laws — mistake of fact. Mistake of foreign laws is a mistake of fact.

History: En. Sec. 2124, Civ. C. 1895; re-en. Sec. 4985, Rev. C. 1907; re-en. Sec. 7487, R.C.M. 1921; Cal. Civ. C. Sec. 1579; Field Civ. C. Sec. 764; re-en. Sec. 7487, R.C.M. 1935; R.C.M. 1947, 13-315.

Part 5

Communication of Consent — Revocation of Proposal

28-2-501. How consent is communicated. (1) Consent can be communicated with effect only by some act or omission of the party contracting by which he intends to communicate it or which necessarily tends to such communication.

(2) If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases, any reasonable and usual mode may be adopted.

History: En. Secs. 2126, 2127, Civ. C. 1895; re-en. Secs. 4987, 4988, Rev. C. 1907; re-en. Secs. 7489, 7490, R.C.M. 1921; Cal. Civ. C. Secs. 1581, 1582; Field Civ. C. Secs. 766, 767; re-en. Secs. 7489, 7490, R.C.M. 1935; R.C.M. 1947, 13-317, 13-318.

28-2-502. When consent is considered fully communicated. Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer in conformity to 28-2-501(2).

History: En. Sec. 2128, Civ. C. 1895; re-en. Sec. 4989, Rev. C. 1907; re-en. Sec. 7491, R.C.M. 1921; Cal. Civ. C. Sec. 1583; Field Civ. C. Sec. 768; re-en. Sec. 7491, R.C.M. 1935; R.C.M. 1947, 13-319.

28-2-503. Implied acceptance. (1) Performance of the conditions of a proposal or the acceptance of the consideration offered with a proposal is an acceptance of the proposal.

(2) A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known or ought to be known to the person accepting.

History: En. Secs. 2129, 2134, Civ. C. 1895; re-en. Secs. 4990, 4995, Rev. C. 1907; re-en. Secs. 7492, 7497, R.C.M. 1921; Cal. Civ. C. Secs. 1584, 1589; Field Civ. C. Secs. 769, 774; re-en. Secs. 7492, 7497, R.C.M. 1935; R.C.M. 1947, 13-320, 13-325.

28-2-504. Acceptance to be absolute. An acceptance must be absolute and unqualified or must include in itself an acceptance of that character which the proposer can separate from the rest and which will conclude the person accepting. A qualified acceptance is a new proposal.

History: En. Sec. 2130, Civ. C. 1895; re-en. Sec. 4991, Rev. C. 1907; re-en. Sec. 7493, R.C.M. 1921; Cal. Civ. C. Sec. 1585; Field Civ. C. Sec. 770; re-en. Sec. 7493, R.C.M. 1935; R.C.M. 1947, 13-321.

28-2-505 through 28-2-510 reserved.

28-2-511. When proposal may be revoked. A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards.

History: En. Sec. 2131, Civ. C. 1895; re-en. Sec. 4992, Rev. C. 1907; re-en. Sec. 7494, R.C.M. 1921; Cal. Civ. C. Sec. 1586; Field Civ. C. Sec. 771; re-en. Sec. 7494, R.C.M. 1935; R.C.M. 1947, 13-322.

28-2-512. How proposal revoked. A proposal is revoked by:

(1) the communication of notice of revocation by the proposer to the other party in the manner prescribed by 28-2-501(1) and 28-2-502 before his acceptance has been communicated to the former;

(2) the lapse of the time prescribed in such proposal for its acceptance or, if no time is so prescribed, the lapse of a reasonable time without communication of the acceptance;

(3) the failure of the acceptor to fulfill a condition precedent to acceptance; or

(4) the death or insanity of the proposer.

History: En. Sec. 2132, Civ. C. 1895; re-en. Sec. 4993, Rev. C. 1907; re-en. Sec. 7495, R.C.M. 1921; Cal. Civ. C. Sec. 1587; Field Civ. C. Sec. 772; re-en. Sec. 7495, R.C.M. 1935; R.C.M. 1947, 13-323.

Part 6

Object of a Contract

28-2-601. Object of contract defined. The object of a contract is the thing which it is agreed on the part of the party receiving the consideration to do or not to do.

History: En. Sec. 2150, Civ. C. 1895; re-en. Sec. 4996, Rev. C. 1907; re-en. Sec. 7498, R.C.M. 1921; Cal. Civ. C. Sec. 1595; Field Civ. C. Sec. 775; re-en. Sec. 7498, R.C.M. 1935; R.C.M. 1947, 13-401.

28-2-602. Essential characteristics of object. The object of the contract must be lawful when the contract is made and possible and ascertainable by the time the contract is to be performed. Everything is deemed possible except that which is impossible in the nature of things.

History: En. Secs. 2151, 2152, Civ. C. 1895; re-en. Secs. 4997, 4998, Rev. C. 1907; re-en. Secs. 7499, 7500, R.C.M. 1921; Cal. Civ. C. Secs. 1596, 1597; Field Civ. C. Secs. 776, 777; re-en. Secs. 7499, 7500, R.C.M. 1935; R.C.M. 1947, 13-402, 13-403.

28-2-603. When contract wholly void. Where a contract has but a single object and such object is unlawful, whether in whole or in part, or wholly impossible of performance or so vaguely expressed as to be wholly unascertainable, the entire contract is void.

History: En. Sec. 2153, Civ. C. 1895; re-en. Sec. 4999, Rev. C. 1907; re-en. Sec. 7501, R.C.M. 1921; Cal. Civ. C. Sec. 1598; Field Civ. C. Sec. 778; re-en. Sec. 7501, R.C.M. 1935; R.C.M. 1947, 13-404.

28-2-604. When contract partially void. Where a contract has several distinct objects of which one at least is lawful and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest.

History: En. Sec. 2154, Civ. C. 1895; re-en. Sec. 5000, Rev. C. 1907; re-en. Sec. 7502, R.C.M. 1921; Cal. Civ. C. Sec. 1599; Field Civ. C. Sec. 779; re-en. Sec. 7502, R.C.M. 1935; R.C.M. 1947, 13-405.

Part 7

Illegal Objects and Provisions

28-2-701. What is unlawful. That is not lawful which is:

(1) contrary to an express provision of law;

(2) contrary to the policy of express law, though not expressly prohibited; or

(3) otherwise contrary to good morals.

History: En. Sec. 2240, Civ. C. 1895; re-en. Sec. 5051, Rev. C. 1907; re-en. Sec. 7553, R.C.M. 1921; Cal. Civ. C. Sec. 1667; Field Civ. C. Sec. 827; re-en. Sec. 7553, R.C.M. 1935; R.C.M. 1947, 13-801.

28-2-702. Contracts which violate policy of the law — exemption from responsibility. All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law.

History: En. Sec. 2241, Civ. C. 1895; re-en. Sec. 5052, Rev. C. 1907; re-en. Sec. 7554, R.C.M. 1921; Cal. Civ. C. Sec. 1668; Field Civ. C. Sec. 828; re-en. Sec. 7554, R.C.M. 1935; R.C.M. 1947, 13-802.

28-2-703. Contracts in restraint of trade generally void. Any contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided for by 28-2-704 or 28-2-705, is to that extent void.

History: En. Sec. 2246, Civ. C. 1895; re-en. Sec. 5057, Rev. C. 1907; re-en. Sec. 7559, R.C.M. 1921; Cal. Civ. C. Sec. 1673; Field Civ. C. Sec. 833; re-en. Sec. 7559, R.C.M. 1935; R.C.M. 1947, 13-807.

28-2-704. Exception — sale of goodwill of business. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or part thereof so long as the buyer or any person deriving title to the goodwill from him carries on a like business therein.

History: En. Sec. 2247, Civ. C. 1895; re-en. Sec. 5058, Rev. C. 1907; re-en. Sec. 7560, R.C.M. 1921; Cal. Civ. C. Sec. 1674; Field Civ. C. Sec. 834; re-en. Sec. 7560, R.C.M. 1935; R.C.M. 1947, 13-808.

28-2-705. Exception — dissolution of partnership. Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted or within a specified part thereof.

History: En. Sec. 2248, Civ. C. 1895; re-en. Sec. 5059, Rev. C. 1907; re-en. Sec. 7561, R.C.M. 1921; Cal. Civ. C. Sec. 1675; Field Civ. C. Sec. 835; re-en. Sec. 7561, R.C.M. 1935; R.C.M. 1947, 13-809.

28-2-706. Contracts in restraint of marriage generally void. Every contract in restraint of the marriage of any person other than a minor is void.

History: En. Sec. 2249, Civ. C. 1895; re-en. Sec. 5060, Rev. C. 1907; re-en. Sec. 7562, R.C.M. 1921; Cal. Civ. C. Sec. 1676; Field Civ. C. Sec. 836; re-en. Sec. 7562, R.C.M. 1935; R.C.M. 1947, 13-810.

28-2-707. What conditions void. A condition in a contract the fulfillment of which is impossible or unlawful within the meaning of part 6 of this chapter or which is repugnant to the nature of the interest created by the contract is void.

History: En. Sec. 1957, Civ. C. 1895; re-en. Sec. 4905, Rev. C. 1907; re-en. Sec. 7407, R.C.M. 1921; Cal. Civ. C. Sec. 1441; Field Civ. C. Sec. 683; re-en. Sec. 7407, R.C.M. 1935; R.C.M. 1947, 58-211.

28-2-708. Restraints upon legal proceedings void. Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void.

History: En. Sec. 2245, Civ. C. 1895; re-en. Sec. 5056, Rev. C. 1907; re-en. Sec. 7558, R.C.M. 1921; Field Civ. C. Sec. 832; re-en. Sec. 7558, R.C.M. 1935; R.C.M. 1947, 13-806.

28-2-709. Illegality of agreement to allow another person to confess judgment, accept service of process, or accept default. (1) No contract in writing by which any promise to pay money is created shall contain any provision either empowering any person to enter judgment by confession against any party to the contract or empowering any person as the agent of any party to the contract to either confess judgment, accept service of process, or consent on behalf of such party to the entry of his default in any proceeding in court upon such contract. Every such provision in any such contract shall be illegal and void and shall be unenforceable in the courts of this state against any party to such contract.

(2) The term "contract", as used in this section, shall include all writings executed contemporaneously with and constituting a part of the same transaction, whether such writings be negotiable or nonnegotiable in form.

History: En. Sec. 1, Ch. 197, L. 1935; re-en. Sec. 7562.1, R.C.M. 1935; R.C.M. 1947, 13-811.

28-2-710 through 28-2-720 reserved.

28-2-721. When provision fixing liquidated damages valid. (1) Every contract by which the amount of damage to be paid or other compensation to be made for a breach of an obligation is determined in anticipation thereof is to that extent void, except as expressly provided in subsection (2).

(2) The parties to a contract may agree therein upon an amount which shall be presumed to be an amount of damage sustained by a breach thereof when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

History: En. Secs. 2243, 2244, Civ. C. 1895; re-en. Secs. 5054, 5055, Rev. C. 1907; re-en. Secs. 7556, 7557, R.C.M. 1921; Cal. Civ. C. Secs. 1670, 1671; Field Civ. C. Secs. 830, 831; re-en. Secs. 7556, 7557, R.C.M. 1935; R.C.M. 1947, 13-804, 13-805.

28-2-722. Contracts for personal services limited to two years. A contract to render personal service other than a contract of apprenticeship, as provided in the chapter on apprentices, cannot be enforced against the employee beyond the term of 2 years from the commencement of service under it; but if the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.

History: En. Sec. 2675, Civ. C. 1895; re-en. Sec. 5258, Rev. C. 1907; re-en. Sec. 7773, R.C.M. 1921; Cal. Civ. C. Sec. 1980; Field Civ. C. Sec. 1013; re-en. Sec. 7773, R.C.M. 1935; R.C.M. 1947, 41-206.

Part 8

Consideration

28-2-801. What constitutes good consideration. Any benefit conferred or agreed to be conferred upon the promisor by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered or agreed to be suffered by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor is a good consideration for a promise.

History: En. Sec. 2160, Civ. C. 1895; re-en. Sec. 5001, Rev. C. 1907; re-en. Sec. 7503, R.C.M. 1921; Cal. Civ. C. Sec. 1605; Field Civ. C. Sec. 780; re-en. Sec. 7503, R.C.M. 1935; R.C.M. 1947, 13-501.

28-2-802. Extent to which existing legal or moral obligation is good consideration. An existing legal obligation resting upon the promisor, a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee is also a good consideration for a promise to an extent corresponding with the extent of the obligation, but no further or otherwise.

History: En. Sec. 2161, Civ. C. 1895; re-en. Sec. 5002, Rev. C. 1907; re-en. Sec. 7504, R.C.M. 1921; Cal. Civ. C. Sec. 1606; Field Civ. C. Sec. 781; re-en. Sec. 7504, R.C.M. 1935; R.C.M. 1947, 13-502.

28-2-803. Consideration to be lawful — effect of illegality. The consideration of a contract must be lawful within the meaning of 28-2-701. If any part of a single consideration for one or more objects or of several considerations for a single object is unlawful, the entire contract is void.

History: En. Secs. 2162, 2163, Civ. C. 1895; re-en. Secs. 5003, 5004, Rev. C. 1907; re-en. Secs. 7505, 7506, R.C.M. 1921; Cal. Civ. C. Secs. 1607, 1608; Field Civ. C. Secs. 782, 783; re-en. Sec. 7505, 7506, R.C.M. 1935; R.C.M. 1947, 13-503, 13-504.

28-2-804. Written instrument presumptive evidence of consideration. A written instrument is presumptive evidence of a consideration.

History: En. Sec. 2169, Civ. C. 1895; re-en. Sec. 5010, Rev. C. 1907; re-en. Sec. 7512, R.C.M. 1921; Cal. Civ. C. Sec. 1614; re-en. Sec. 7512, R.C.M. 1935; R.C.M. 1947, 13-510.

28-2-805. Burden of proof of want of consideration. The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.

History: En. Sec. 2170, Civ. C. 1895; re-en. Sec. 5011, Rev. C. 1907; re-en. Sec. 7513, R.C.M. 1921; Cal. Civ. C. Sec. 1615; re-en. Sec. 7513, R.C.M. 1935; R.C.M. 1947, 13-511.

28-2-806 through 28-2-810 reserved.

28-2-811. Applicability of rules concerning object to executory consideration. A consideration may be executed or executory, in whole or in part. Insofar as it is executory, it is subject to the provisions of part 6 of this chapter.

History: En. Sec. 2164, Civ. C. 1895; re-en. Sec. 5005, Rev. C. 1907; re-en. Sec. 7507, R.C.M. 1921; Cal. Civ. C. Sec. 1609; Field Civ. C. Sec. 784; re-en. Sec. 7507, R.C.M. 1935; R.C.M. 1947, 13-505.

28-2-812. How amount of executory consideration may be determined. When a consideration is executory, it is not indispensable that the contract should specify its amount or the means of ascertaining it. It may be left to the decision of a third person or regulated by any specified standard.

History: En. Sec. 2165, Civ. C. 1895; re-en. Sec. 5006, Rev. C. 1907; re-en. Sec. 7508, R.C.M. 1921; Cal. Civ. C. Sec. 1610; Field Civ. C. Sec. 785; re-en. Sec. 7508, R.C.M. 1935; R.C.M. 1947, 13-506.

28-2-813. Determination by interested party. When a contract does not determine the amount of the consideration or the method by which it is to be ascertained or when it leaves the amount thereof to the discretion of an interested party, the consideration must be so much money as the object of the contract is reasonably worth.

History: En. Sec. 2166, Civ. C. 1895; re-en. Sec. 5007, Rev. C. 1907; re-en. Sec. 7509, R.C.M. 1921; Cal. Civ. C. Sec. 1611; Field Civ. C. Sec. 786; re-en. Sec. 7509, R.C.M. 1935; R.C.M. 1947, 13-507.

28-2-814. Effect of impossibility of designated exclusive method of determination. (1) Where a contract provides an exclusive method by which its consideration is to be ascertained, which method is on its face impossible of execution, the entire contract is void.

(2) Where a contract provides an exclusive method by which its consideration is to be ascertained, which method appears possible on its face but in fact is or becomes impossible of execution, such provision only is void.

History: En. Secs. 2167, 2168, Civ. C. 1895; re-en. Secs. 5008, 5009, Rev. C. 1907; re-en. Secs. 7510, 7511, R.C.M. 1921; Cal. Civ. C. Secs. 1612, 1613; Field Civ. C. Secs. 787, 788; re-en. Secs. 7510, 7511, R.C.M. 1935; R.C.M. 1947, 13-508, 13-509.

Part 9

Written Contracts

28-2-901. When contracts may be oral. All contracts may be oral except such as are specially required by statute to be in writing.

History: En. Sec. 2183, Civ. C. 1895; re-en. Sec. 5015, Rev. C. 1907; re-en. Sec. 7517, R.C.M. 1921; Cal. Civ. C. Sec. 1622; Field Civ. C. Sec. 792; re-en. Sec. 7517, R.C.M. 1935; R.C.M. 1947, 13-604.

28-2-902. Enforcement of contract not in writing through fraud. Where a contract which is required by law to be in writing is prevented from being put into writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing and acts upon such belief to his prejudice may enforce it against the fraudulent party.

History: En. Sec. 2184, Civ. C. 1895; re-en. Sec. 5016, Rev. C. 1907; re-en. Sec. 7518, R.C.M. 1921; Cal. Civ. C. Sec. 1623; Field Civ. C. Sec. 793; re-en. Sec. 7518, R.C.M. 1935; R.C.M. 1947, 13-605.

28-2-903. What contracts must be in writing. (1) The following contracts are invalid unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged or his agent:

(a) an agreement that by its terms is not to be performed within a year from the making thereof;

(b) a special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in 28-11-105;

(c) an agreement made upon consideration of marriage other than a mutual promise to marry;

(d) an agreement for the leasing for a longer period than 1 year or for the sale of real property or of an interest therein. Such agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent be in writing, subscribed by the party sought to be charged.

(e) an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission.

(2) In the following cases the agreement is invalid unless the same or some note or memorandum thereof be in writing and subscribed by the party charged or by his agent; evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents:

(a) an agreement that by its terms is not to be performed within a year from the making thereof;

(b) a special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in 28-11-105;

(c) an agreement made upon consideration of marriage other than a mutual promise to marry;

(d) an agreement for the leasing for a longer period than 1 year or for the sale of real property or of an interest therein. Such agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent be in writing, subscribed by the party sought to be charged.

(3) No evidence is admissible to charge a person upon a representation as to the credit of a third person unless such representation or some memorandum thereof be in writing and either subscribed by or in the handwriting of the party to be charged.

(4) Subsections (1) and (2) shall not apply to agreements subject to the Uniform Commercial Code.

History: (1)Subds. a to c; en. Secs. 12 to 14, p. 494, Bannack Stat.; re-en. Secs. 12 to 14, pp. 393, 394, Cod. Stat. 1871; re-en. Secs. 166 to 168, 5th Div. Rev. Stat.

1879; re-en. Secs. 223 to 225, 5th Div. Comp. Stat. 1887; amd. Sec. 2185, Civ. C. 1895; re-en. Sec. 5017, Rev. C. 1907; Subd. d; en. Sec. 8., p. 493, Bannack Stat.; re-en. Sec. 8, p. 393, Cod. Stat. 1871; re-en. Sec. 162, 5th Div. Rev. Stat. 1879; re-en. Sec. 219, 5th Div. Comp. Stat. 1887; amd. Sec. 2185, Civ. C. 1895; re-en. Sec. 5017, Rev. C. 1907; Subd. e; en. Sec. 2185, Civ. C. 1895; re-en. Sec. 5017, Rev. C. 1907; all subdivisions re-en. Sec. 7519, R.C.M. 1921; Cal. Civ. C. Sec. 1624; re-en. Sec. 7519, R.C.M. 1935; amd. Sec. 11-110, Ch. 264, L. 1963; Sec. 13-606, R.C.M. 1947; (2), (4)En. Sec. 3276, C. Civ. Proc. 1895; re-en. Sec. 7969, Rev. C. 1907; re-en. Sec. 10613, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1973; re-en. Sec. 10613, R.C.M. 1935; amd. Sec. 11-171, Ch. 264, L. 1963; Sec. 93-1401-7, R.C.M. 1947; (3)En. Sec. 3277, C. Civ. Proc. 1895; re-en. Sec. 7970, Rev. C. 1907; re-en. Sec. 10614, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1974; re-en. Sec. 10614, R.C.M. 1935; Sec. 93-1401-8, R.C.M. 1947; R.C.M. 1947, 13-606, 93-1401-7, 93-1401-8.

28-2-904. Effect of written contract on oral agreements. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.

History: En. Sec. 2186, Civ. C. 1895; re-en. Sec. 5018, Rev. C. 1907; re-en. Sec. 7520, R.C.M. 1921; Cal. Civ. C. Sec. 1625; Field Civ. C. Sec. 795; re-en. Sec. 7520, R.C.M. 1935; R.C.M. 1947, 13-607.

28-2-905. When extrinsic evidence concerning a written agreement may be considered. (1) When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms and, therefore, there can be between the parties and their representives or successors in interest no evidence of the terms of the agreement other than the contents of the writing except in the following cases:

(a) where a mistake or imperfection of the writing is put in issue by the pleadings;

(b) where the validity of the agreement is the fact in dispute.

(2) But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in 1-4-102, or to explain an extrinsic ambiguity or to establish illegality or fraud.

(3) The term "agreement" includes deeds and wills as well as contracts between parties.

History: En. Sec. 610, p. 198, L. 1877; re-en. Sec. 610, 1st Div. Rev. Stat. 1879; re-en. Sec. 628, 1st Div. Comp. Stat. 1887; re-en. Sec. 3132, C. Civ. Proc. 1895; re-en. Sec. 7873, Rev. C. 1907; re-en. Sec. 10517, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1856; re-en. Sec. 10517, R.C.M. 1935; R.C.M. 1947, 93-401-13.

28-2-906. When written contract takes effect. A contract in writing takes effect upon its delivery to the party in whose favor it is made or to his agent.

History: En. Sec. 2187, Civ. C. 1895; re-en. Sec. 5019, Rev. C. 1907; re-en. Sec. 7521, R.C.M. 1921; Cal. Civ. C. Sec. 1626; Field Civ. C. Sec. 796; re-en. Sec. 7521, R.C.M. 1935; R.C.M. 1947, 13-608.

28-2-907. Applicability of rules concerning transfers in general. The provisions of Title 70, chapter 1, part 5, and 70-20-110 concerning the delivery of grants, absolute and conditional, apply to all written contracts.

History: En. Sec. 2188, Civ. C. 1895; re-en. Sec. 5020, Rev. C. 1907; re-en. Sec. 7522, R.C.M. 1921; Cal. Civ. C. Sec. 1627; Field Civ. C. Sec. 797; re-en. Sec. 7522, R.C.M. 1935; R.C.M. 1947, 13-609.

Parts 10 through 14 reserved

Part 15

Enforcement of Contracts

28-2-1501. When successive actions on same contract permitted. Successive actions may be maintained upon the same contract or transaction whenever after the former action a new cause of action arises therefrom.

History: En. Sec. 426, p. 130, Bannack Stat.; re-en. Sec. 496, p. 232, L. 1867; re-en. Sec. 20, p. 30, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 1893, C. Civ. Proc. 1895; re-en. Sec. 7186, Rev. C. 1907; re-en. Sec. 9819, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1047; re-en. Sec. 9819, R.C.M. 1935; R.C.M. 1947, 93-8704.

Part 16

Modification of Contracts

28-2-1601. Alteration of oral contract by parties. A contract not in writing may be altered in any respect by consent of the parties in writing without a new consideration and is extinguished thereby to the extent of the new alteration.

History: En. Sec. 2280, Civ. C. 1895; re-en. Sec. 5066, Rev. C. 1907; re-en. Sec. 7568, R.C.M. 1921; Cal. Civ. C. Sec. 1697; Based on Field Civ. C. Sec. 842; re-en. Sec. 7568, R.C.M. 1935; R.C.M. 1947, 13-906.

28-2-1602. How written contract may be altered by parties. A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise.

History: En. Sec. 2281, Civ. C. 1895; re-en. Sec. 5067, Rev. C. 1907; re-en. Sec. 7569, R.C.M. 1921; Cal. Civ. C. Sec. 1698; re-en. Sec. 7569, R.C.M. 1935; R.C.M. 1947, 13-907.

28-2-1603 through 28-2-1610 reserved.

28-2-1611. When written contract may be revised by court. When, through fraud or a mutual mistake of the parties or a mistake of one party while the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons in good faith and for value.

History: En. Sec. 4430, Civ. C. 1895; re-en. Sec. 6108, Rev. C. 1907; re-en. Sec. 8726, R.C.M. 1921; Cal. Civ. C. Sec. 3399; Field Civ. C. Sec. 1899; re-en. Sec. 8726, R.C.M. 1935; R.C.M. 1947, 17-901.

28-2-1612. Presumption that parties intended equitable agreement. For the purpose of revising a contract, it must be presumed that all the parties thereto intended to make an equitable and conscientious agreement.

History: En. Sec. 4431, Civ. C. 1895; re-en. Sec. 6109, Rev. C. 1907; re-en. Sec. 8727, R.C.M. 1921; Cal. Civ. C. Sec. 3400; Field Civ. C. Sec. 1900; re-en. Sec. 8727, R.C.M. 1935; R.C.M. 1947, 17-902.

28-2-1613. Scope of court's inquiry. In revising a written instrument, the court may inquire what the instrument was intended to mean and what were intended to be its legal consequences and is not confined to the inquiry what the language of the instrument was intended to be.

History: En. Sec. 4432, Civ. C. 1895; re-en. Sec. 6110, Rev. C. 1907; re-en. Sec. 8728, R.C.M. 1921; Cal. Civ. C. Sec. 3401; Field Civ. C. Sec. 1901; re-en. Sec. 8728, R.C.M. 1935; R.C.M. 1947, 17-903.

28-2-1614. Specific enforcement of revised contract. A contract may be first revised and then specifically enforced.

History: En. Sec. 4433, Civ. C. 1895; re-en. Sec. 6111, Rev. C. 1907; re-en. Sec. 8729, R.C.M. 1921; Cal. Civ. C. Sec. 3402; Field Civ. C. Sec. 1902; re-en. Sec. 8729, R.C.M. 1935; R.C.M. 1947, 17-904.

Part 17

Extinction of Contracts — Rescission

28-2-1701. How contract extinguished. (1) A contract may be extinguished in like manner with any other obligation and also in the manner prescribed by this section, 28-2-1601, 28-2-1602, and 28-2-1702 through 28-2-1713.

(2) A contract is extinguished by its rescission.

History: (1)En. Sec. 2260, Civ. C. 1895; re-en. Sec. 5061, Rev. C. 1907; re-en. Sec. 7563, R.C.M. 1921; Cal. Civ. C. Sec. 1682; re-en. Sec. 7563, R.C.M. 1935; Sec. 13-901, R.C.M. 1947; (2)En. Sec. 2270, Civ. C. 1895; re-en. Sec. 5062, Rev. C. 1907; re-en. Sec. 7564, R.C.M. 1921; Cal. Civ. C. Sec. 1688; Field Civ. C. Sec. 838; re-en. Sec. 7564, R.C.M. 1935; Sec. 13-902, R.C.M. 1947; R.C.M. 1947, 13-901, 13-902.

28-2-1702. Extinction of written contract by destruction or cancellation. The destruction or cancellation of a written contract or of the signature of the parties liable thereon with intent to extinguish the obligation thereof extinguishes it as to all the parties consenting to the act.

History: En. Sec. 2282, Civ. C. 1895; re-en. Sec. 5068, Rev. C. 1907; re-en. Sec. 7570, R.C.M. 1921; Cal. Civ. C. Sec. 1699; re-en. Sec. 7570, R.C.M. 1935; R.C.M. 1947, 13-908.

28-2-1703. Extinction of executory obligations of contract by destruction, cancellation, or alteration. (1) The intentional destruction, cancellation, or material alteration of a written contract by a party entitled to any benefit under it or with his consent extinguishes all the executory obligations of the contract in his favor against parties who do not consent to the act.

(2) Where a contract is executed in duplicate, an alteration or destruction of one copy while the other exists is not within the provisions of subsection (1).

History: En. Secs. 2283, 2284, Civ. C. 1895; re-en. Secs. 5069, 5070, Rev. C. 1907; re-en. Secs. 7571, 7572, R.C.M. 1921; Cal. Civ. C. Secs. 1700, 1701; Field Civ. C. Secs. 845, 846; re-en. Secs. 7571, 7572, R.C.M. 1935; R.C.M. 1947, 13-909, 13-910.

28-2-1704 through 28-2-1710 reserved.

28-2-1711. When party may rescind. A party to a contract may rescind the same in the following cases only:

(1) if the consent of the party rescinding or of any party jointly contracting with him was given by mistake or obtained through duress, menace, fraud, or undue influence exercised by or with the connivance of the party as to whom he rescinds or of any other party to the contract jointly interested with such party;

(2) if, through the fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part;

(3) if such consideration becomes entirely void from any cause;

(4) if such consideration, before it is rendered to him, fails in a material respect from any cause; or

(5) by consent of all the other parties.

History: En. Sec. 2271, Civ. C. 1895; re-en. Sec. 5063, Rev. C. 1907; re-en. Sec. 7565, R.C.M. 1921; Cal. Civ. C. Sec. 1689; Field Civ. C. Sec. 839; re-en. Sec. 7565, R.C.M. 1935; R.C.M. 1947, 13-903.

28-2-1712. When stipulation against rescission ineffective. A stipulation that errors of description shall not avoid a contract or shall be the subject of compensation, or both, does not take away the right of rescission for fraud or for mistake where such mistake is in a matter essential to the inducement of the contract and is not capable of exact and entire compensation.

History: En. Sec. 2272, Civ. C. 1895; re-en. Sec. 5064, Rev. C. 1907; re-en. Sec. 7566, R.C.M. 1921; Cal. Civ. C. Sec. 1690; Field Civ. C. Sec. 840; re-en. Sec. 7566, R.C.M. 1935; R.C.M. 1947, 13-904.

28-2-1713. How rescission accomplished. Rescission, when not effected by consent, can be accomplished only by the use on the part of the party rescinding of reasonable diligence to comply with the following rules:

(1) He must rescind promptly upon discovering the facts which entitle him to rescind if he is free from duress, menace, undue influence, or disability and is aware of his right to rescind.

(2) He must restore to the other party everything of value which he has received from him under the contract or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so.

History: En. Sec. 2273, Civ. C. 1895; re-en. Sec. 5065, Rev. C. 1907; re-en. Sec. 7567, R.C.M. 1921; Cal. Civ. C. Sec. 1691; Field Civ. C. Sec. 841; re-en. Sec. 7567, R.C.M. 1935; R.C.M. 1947, 13-905.

28-2-1714. When rescission may be adjudged. The rescission of a written contract may be adjudged on the application of a party aggrieved:

(1) in any of the cases mentioned in 28-2-1711;

(2) where the contract is unlawful for causes not apparent upon its face and the parties were not equally in fault; or

(3) when the public interest will be prejudiced by permitting it to stand.

History: En. Sec. 4440, Civ. C. 1895; re-en. Sec. 6112, Rev. C. 1907; re-en. Sec. 8730, R.C.M. 1921; Cal. Civ. C. Sec. 3406; Field Civ. C. Sec. 1903; re-en. Sec. 8730, R.C.M. 1935; R.C.M. 1947, 17-905.

28-2-1715. When rescission may be adjudged for mistake. Rescission cannot be adjudged for mere mistake unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.

History: En. Sec. 4441, Civ. C. 1895; re-en. Sec. 6113, Rev. C. 1907; re-en. Sec. 8731, R.C.M. 1921; Cal. Civ. C. Sec. 3407; Field Civ. C. Sec. 1904; re-en. Sec. 8731, R.C.M. 1935; R.C.M. 1947, 17-906.

28-2-1716. Power of court to require party rescinding to do equity. On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation or restoration to the other which justice may require.

History: En. Sec. 4442, Civ. C. 1895; re-en. Sec. 6114, Rev. C. 1907; re-en. Sec. 8732, R.C.M. 1921; Cal. Civ. C. Sec. 3408; Field Civ. C. Sec. 1905; re-en. Sec. 8732, R.C.M. 1935; R.C.M. 1947, 17-907.

CHAPTER 3

INTERPRETATION OF CONTRACTS

Part 1 — General Provisions

Section

28-3-101. Rules of interpretation to be uniform.
28-3-102. What law and usage to govern interpretation.

Part 2 — General Rules of Interpretation

28-3-201. Interpretation giving effect to contract favored.
28-3-202. Effect to be given to every part of contract.
28-3-203. When several contracts taken together.
28-3-204. How repugnancies reconciled.
28-3-205. Written or original terms to control printed terms.
28-3-206. Uncertainty to be resolved against party causing it.

Part 3 — Intention of the Parties

28-3-301. Interpretation to give effect to mutual intention.
28-3-302. How intention ascertained.
28-3-303. Writing generally to determine intention.
28-3-304. When writing disregarded.
28-3-305. Contract restricted to its apparent objects.
28-3-306. Interpretation of terms that are ambiguous or were intended in a different sense by different parties.
28-3-307. Particular clauses subordinate to general intent.

Part 4 — Factors Considered in Determining Intention

28-3-401. Extent to which language governs interpretation.
28-3-402. Reference to circumstances permissible.
28-3-403. Evidence of usage to clarify.

Part 5 — Interpretation of Words

28-3-501. Words generally understood in their ordinary sense.
28-3-502. Interpretation of technical words.
28-3-503. Inconsistent words to be rejected.

Part 6 — Time of Performance

28-3-601. Time of performance when not specified.
28-3-602. When time considered of the essence.
28-3-603. Postponement of performance date which falls on holiday.

Part 7 — Provisions Implied by Law

28-3-701. Stipulations necessary for reasonableness or conformity to usage.

28-3-702. Necessary and incidental terms.
28-3-703. When promise presumed to be joint and several.
28-3-704. Contractual right to attorney fees treated as reciprocal.

Part 1

General Provisions

28-3-101. Rules of interpretation to be uniform. All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this code.

History: En. Sec. 2200, Civ. C. 1895; re-en. Sec. 5024, Rev. C. 1907; re-en. Sec. 7526, R.C.M. 1921; Cal. Civ. C. Sec. 1635; Field Civ. C. Sec. 800; re-en. Sec. 7526, R.C.M. 1935; R.C.M. 1947, 13-701.

28-3-102. What law and usage to govern interpretation. A contract is to be interpreted according to the law and usage of the place where it is to be performed or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.

History: En. Sec. 2211, Civ. C. 1895; re-en. Sec. 5035, Rev. C. 1907; re-en. Sec. 7537, R.C.M. 1921; Cal. Civ. C. Sec. 1646; Field Civ. C. Sec. 811; re-en. Sec. 7537, R.C.M. 1935; R.C.M. 1947, 13-712.

Part 2

General Rules of Interpretation

28-3-201. Interpretation giving effect to contract favored. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect if it can be done without violating the intention of the parties.

History: En. Sec. 2208, Civ. C. 1895; re-en. Sec. 5032, Rev. C. 1907; re-en. Sec. 7534, R.C.M. 1921; Cal. Civ. C. Sec. 1643; Field Civ. C. Sec. 808; re-en. Sec. 7534, R.C.M. 1935; R.C.M. 1947, 13-709.

28-3-202. Effect to be given to every part of contract. The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other.

History: En. Sec. 2206, Civ. C. 1895; re-en. Sec. 5030, Rev. C. 1907; re-en. Sec. 7532, R.C.M. 1921; Cal. Civ. C. Sec. 1641; Field Civ. C. Sec. 806; re-en. Sec. 7532, R.C.M. 1935; R.C.M. 1947, 13-707.

28-3-203. When several contracts taken together. Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction are to be taken together.

History: En. Sec. 2207, Civ. C. 1895; re-en. Sec. 5031, Rev. C. 1907; re-en. Sec. 7533, R.C.M. 1921; Cal. Civ. C. Sec. 1642; Field Civ. C. Sec. 807; re-en. Sec. 7533, R.C.M. 1935; R.C.M. 1947, 13-708.

28-3-204. How repugnancies reconciled. Repugnancies in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract.

History: En. Sec. 2217, Civ. C. 1895; re-en. Sec. 5041, Rev. C. 1907; re-en. Sec. 7543, R.C.M. 1921; Cal. Civ. C. Sec. 1652; Field Civ. C. Sec. 817; re-en. Sec. 7543, R.C.M. 1935; R.C.M. 1947, 13-718.

28-3-205. Written or original terms to control printed terms. Where a contract is partly written and partly printed or where part of it is written or printed under the special directions of the parties and with a special view to their intention and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts and the parts which are purely original control those which are copied from a form and, if the two are absolutely repugnant, the latter must be so far disregarded.

History: En. Sec. 2216, Civ. C. 1895; re-en. Sec. 5040, Rev. C. 1907; re-en. Sec. 7542, R.C.M. 1921; Cal. Civ. C. Sec. 1651; Field Civ. C. Sec. 816; re-en. Sec. 7542, R.C.M. 1935; R.C.M. 1947, 13-717.

28-3-206. Uncertainty to be resolved against party causing it. In cases of uncertainty not removed by parts 1 through 5 of this chapter, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party, except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party.

History: En. Sec. 2219, Civ. C. 1895; re-en. Sec. 5043, Rev. C. 1907; re-en. Sec. 7545, R.C.M. 1921; Cal. Civ. C. Sec. 1654; Field Civ. C. Sec. 819; re-en. Sec. 7545, R.C.M. 1935; R.C.M. 1947, 13-720.

Part 3

Intention of the Parties

28-3-301. Interpretation to give effect to mutual intention. A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.

History: En. Sec. 2201, Civ. C. 1895; re-en. Sec. 5025, Rev. C. 1907; re-en. Sec. 7527, R.C.M. 1921; Cal. Civ. C. Sec. 1636; Field Civ. C. Sec. 801; re-en. Sec. 7527, R.C.M. 1935; R.C.M. 1947, 13-702.

28-3-302. How intention ascertained. For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this chapter are to be applied.

History: En. Sec. 2202, Civ. C. 1895; re-en. Sec. 5026, Rev. C. 1907; re-en. Sec. 7528, R.C.M. 1921; Cal. Civ. C. Sec. 1637; Field Civ. C. Sec. 802; re-en. Sec. 7528, R.C.M. 1935; R.C.M. 1947, 13-703.

28-3-303. Writing generally to determine intention. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible, subject, however, to the other provisions of this chapter.

History: En. Sec. 2204, Civ. C. 1895; re-en. Sec. 5028, Rev. C. 1907; re-en. Sec. 7530, R.C.M. 1921; Cal. Civ. C. Sec. 1639; Field Civ. C. Sec. 804; re-en. Sec. 7530, R.C.M. 1935; R.C.M. 1947, 13-705.

28-3-304. When writing disregarded. When through fraud, mistake, or accident a written contract fails to express the real intention of the parties, such intention is to be regarded and the erroneous parts of the writing disregarded.

History: En. Sec. 2205, Civ. C. 1895; re-en. Sec. 5029, Rev. C. 1907; re-en. Sec. 7531, R.C.M. 1921; Cal. Civ. C. Sec. 1640; Field Civ. C. Sec. 805; re-en. Sec. 7531, R.C.M. 1935; R.C.M. 1947, 13-706.

28-3-305. Contract restricted to its apparent objects. However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.

History: En. Sec. 2213, Civ. C. 1895; re-en. Sec. 5037, Rev. C. 1907; re-en. Sec. 7539, R.C.M. 1921; Cal. Civ. C. Sec. 1648; Field Civ. C. Sec. 813; re-en. Sec. 7539, R.C.M. 1935; R.C.M. 1947, 13-714.

28-3-306. Interpretation of terms that are ambiguous or were intended in a different sense by different parties. (1) If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.

(2) When the terms of an agreement have been intended in a different sense by different parties to it, that sense is to prevail against either party in which he supposed the other understood it; and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made.

History: (1)En. Sec. 2214, Civ. C. 1895; re-en. Sec. 5038, Rev. C. 1907; re-en. Sec. 7540, R.C.M. 1921; Cal. Civ. C. Sec. 1649; Field Civ. C. Sec. 814; re-en. Sec. 7540, R.C.M. 1935; Sec. 13-715, R.C.M. 1947; (2)En. Sec. 618, p. 200, L. 1877; re-en. Sec. 618, 1st Div. Rev. Stat. 1879; re-en. Sec. 636, 1st Div. Comp. Stat. 1887; re-en. Sec. 3140, C. Civ. Proc. 1895; re-en. Sec. 7881, Rev. C. 1907; re-en. Sec. 10525, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1864; re-en. Sec. 10525, R.C.M. 1935; Sec. 93-401-21, R.C.M. 1947; R.C.M. 1947, 13-715, 93-401-21.

28-3-307. Particular clauses subordinate to general intent. Particular clauses of a contract are subordinate to its general intent.

History: En. Sec. 2215, Civ. C. 1895; re-en. Sec. 5039, Rev. C. 1907; re-en. Sec. 7541, R.C.M. 1921; Cal. Civ. C. Sec. 1650; Field Civ. C. Sec. 815; re-en. Sec. 7541, R.C.M. 1935; R.C.M. 1947, 13-716.

Part 4

Factors Considered in Determining Intention

28-3-401. Extent to which language governs interpretation. The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity.

History: En. Sec. 2203, Civ. C. 1895; re-en. Sec. 5027, Rev. C. 1907; re-en. Sec. 7529, R.C.M. 1921; Cal. Civ. C. Sec. 1638; Field Civ. C. Sec. 803; re-en. Sec. 7529, R.C.M. 1935; R.C.M. 1947, 13-704.

28-3-402. Reference to circumstances permissible. A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates.

History: En. Sec. 2212, Civ. C. 1895; re-en. Sec. 5036, Rev. C. 1907; re-en. Sec. 7538, R.C.M. 1921; Cal. Civ. C. Sec. 1647; Field Civ. C. Sec. 812; re-en. Sec. 7538, R.C.M. 1935; R.C.M. 1947, 13-713.

28-3-403. Evidence of usage to clarify. In conformity with the rules of evidence, upon a trial evidence may be given of usage to explain the true character of an act or contract where such true character is not otherwise plain, but usage is never admissible except as an instrument of interpretation.

History: En. Sec. 624, p. 201, L. 1877; re-en. Sec. 624, 1st Div. Rev. Stat. 1879; re-en. Sec. 642, 1st Div. Comp. Stat. 1887; re-en. Sec. 3146, C. Civ. Proc. 1895; re-en. Sec. 7887, Rev. C. 1907; re-en. Sec. 10531, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1870; re-en. Sec. 10531, R.C.M. 1935; R.C.M. 1947, 93-401-27(part).

Part 5

Interpretation of Words

28-3-501. Words generally understood in their ordinary sense. The words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning unless used by the parties in a technical sense or unless a special meaning is given to them by usage, in which case the latter must be followed.

History: En. En. Sec. 2209, Civ. C. 1895; re-en. Sec. 5033, Rev. C. 1907; re-en. Sec. 7535, R.C.M. 1921; Cal. Civ. C. Sec. 1644; Field Civ. C. Sec. 809; re-en. Sec. 7535, R.C.M. 1935; R.C.M. 1947, 13-710.

28-3-502. Interpretation of technical words. Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate unless clearly used in a different sense.

History: En. Sec. 2210, Civ. C. 1895; re-en. Sec. 5034, Rev. C. 1907; re-en. Sec. 7536, R.C.M. 1921; Cal. Civ. C. Sec. 1645; Field Civ. C. Sec. 810; re-en. Sec. 7536, R.C.M. 1935; R.C.M. 1947, 13-711.

28-3-503. Inconsistent words to be rejected. Words in a contract which are wholly inconsistent with its nature or with the main intention of the parties are to be rejected.

History: En. Sec. 2218, Civ. C. 1895; re-en. Sec. 5042, Rev. C. 1907; re-en. Sec. 7544, R.C.M. 1921; Cal. Civ. C. Sec. 1653; Field Civ. C. Sec. 818; re-en. Sec. 7544, R.C.M. 1935; R.C.M. 1947, 13-719.

Part 6

Time of Performance

28-3-601. Time of performance when not specified. If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly (for example, if it consists in the payment of money only), it must be performed immediately upon the thing to be done being exactly ascertained.

History: En. Sec. 2222, Civ. C. 1895; re-en. Sec. 5046, Rev. C. 1907; re-en. Sec. 7548, R.C.M. 1921; Cal. Civ. C. Sec. 1657; Field Civ. C. Sec. 822; re-en. Sec. 7548, R.C.M. 1935; R.C.M. 1947, 13-723.

28-3-602. When time considered of the essence. Time is never considered as of the essence of a contract unless by its terms expressly so provided.

History: En. Sec. 2223, Civ. C. 1895; re-en. Sec. 5047, Rev. C. 1907; re-en. Sec. 7549, R.C.M. 1921; Cal. Civ. C. Sec. 1658; Field Civ. C. Sec. 823; re-en. Sec. 7549, R.C.M. 1935; R.C.M. 1947, 13-724.

28-3-603. Postponement of performance date which falls on holiday. Whenever any act of a secular nature other than a work of necessity or mercy is appointed by contract to be performed upon a particular day which day falls upon a holiday, such act may be performed upon the next business day with the same effect as if it had been performed upon the day appointed.

History: En. Sec. 12, Pol. C. 1895; re-en. Sec. 12, Rev. C. 1907; re-en. Sec. 12, R.C.M. 1921; Cal. Pol. C. Sec. 13; re-en. Sec. 12, R.C.M. 1935; R.C.M. 1947, 19-109.

Part 7

Provisions Implied by Law

28-3-701. Stipulations necessary for reasonableness or conformity to usage. Stipulations which are necessary to make a contract reasonable or conformable to usage are implied in respect to matters concerning which the contract manifests no contrary intention.

History: En. Sec. 2220, Civ. C. 1895; re-en. Sec. 5044, Rev. C. 1907; re-en. Sec. 7546, R.C.M. 1921; Cal. Civ. C. Sec. 1655; Field Civ. C. Sec. 820; re-en. Sec. 7546, R.C.M. 1935; R.C.M. 1947, 13-721.

28-3-702. Necessary and incidental terms. All things that in law or usage are considered as incidental to a contract or as necessary to carry it into effect are implied therefrom unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded.

History: En. Sec. 2221, Civ. C. 1895; re-en. Sec. 5045, Rev. C. 1907; re-en. Sec. 7547, R.C.M. 1921; Cal. Civ. C. Sec. 1656; Field Civ. C. Sec. 821; re-en. Sec. 7547, R.C.M. 1935; R.C.M. 1947, 13-722.

28-3-703. When promise presumed to be joint and several. (1) Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several.

(2) A promise made in the singular number but executed by several persons is presumed to be joint and several.

History: En. Secs. 2224, 2225, Civ. C. 1895; re-en. Secs. 5048, 5049, Rev. C. 1907; re-en. Secs. 7550, 7551, R.C.M. 1921; Cal. Civ. C. Secs. 1659, 1660; Field Civ. C. Secs. 824, 825; re-en. Secs. 7550, 7551, R.C.M. 1935; R.C.M. 1947, 13-725, 13-726.

28-3-704. Contractual right to attorney fees treated as reciprocal. Whenever, by virtue of the provisions of any contract or obligation in the nature of a contract made and entered into at any time after July 1, 1971, one party to such contract or obligation has an express right to recover attorney fees from any other party to the contract or obligation in the event the party having that right shall bring an action upon the contract or obligation, then in any action on such contract or obligation all parties to the contract or obligation shall be deemed to have the same right to recover attorney fees and the prevailing party in any such action, whether by virtue of the express contractual right or by virtue of this section, shall be entitled to recover his reasonable attorney fees from the losing party or parties.

History: En. Sec. 1, Ch. 259, L. 1971; R.C.M. 1947, 93-8601.1.

CHAPTERS 4 THROUGH 9

RESERVED

CHAPTER 10

AGENCY

Part 1 — General Provisions

Section
28-10-101. Definitions of agent and agency.
28-10-102. General versus special agents.
28-10-103. Actual versus ostensible agency.
28-10-104. Who may appoint an agent, who may be an agent.
28-10-105. What acts agent may perform.

Part 2 — Creation of Agency

28-10-201. How agency may be created.
28-10-202. Consideration unnecessary.
28-10-203. When written authorization necessary.
Sections 28-10-204 through 28-10-210 reserved.
28-10-211. How agent's act ratified.
28-10-212. Ratification of part of indivisible transaction.
28-10-213. Ratification not to prejudice third persons.
28-10-214. When ratification void.
28-10-215. When ratification may be rescinded.

Part 3 — Duties of Agent

28-10-301. Agent not to exceed actual authority.
28-10-302. Duty to keep principal informed.
28-10-303. Duty of agent employed to collect negotiable instrument.

Part 4 — Authority of Agent

28-10-401. What authority agent has.
28-10-402. Actual authority defined.
28-10-403. Ostensible authority defined.
28-10-404. When and as to whom agent's authority restricted.
28-10-405. Implied powers of agent.
28-10-406. Interpretation of authority given partly in general and partly in specific terms.
28-10-407. Statutory exceptions to general authority.
28-10-408. When agent may disobey instructions.
28-10-409. No authority to defraud principal.
Sections 28-10-410 through 28-10-420 reserved.
28-10-421. What included in authority to sell personal property.
28-10-422. What included in authority to sell real property.
28-10-423. Authority of agent to sell to receive price.

Part 5 — Subagents

28-10-501. When agent may delegate powers.
28-10-502. Effect of unauthorized employment of subagent.
28-10-503. Effect of authorized employment of subagent.

Part 6 — Rights and Liabilities of Principal

28-10-601. Accural of rights and liabilities to principal.

28-10-602. Principal's responsibility for agent's negligence, omissions, and wrongs.
28-10-603. When instrument binds principal.
28-10-604. When notice to principal or agent is notice to the other.
28-10-605. Extent to which principal bound when agent exceeds authority.
28-10-606. Extent to which principal bound by acts under ostensible authority.
28-10-607. When principal bound by incomplete execution of authority.
28-10-608. Rights of person who deals with agent without knowledge of agency.
28-10-609. Principal's liability when agent given exclusive credit.

Part 7 — Agent's Responsibility to Third Persons

28-10-701. Warranty of authority.
28-10-702. When agent responsible to third persons as a principal.
28-10-703. Responsibility of agent when third person claims property received for principal.
28-10-704. Applicability of laws relating to capacity to contract.

Part 8 — Termination of Agency

28-10-801. Circumstances which terminate any agency.
28-10-802. Circumstances which terminate agency not coupled with an interest.

Part 1

General Provisions

28-10-101. Definitions of agent and agency. An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency.

History: En. Sec. 3070, Civ. C. 1895; re-en. Sec. 5413, Rev. C. 1907; re-en. Sec. 7928, R.C.M. 1921; Cal. Civ. C. Sec. 2295; Field Civ. C. Sec. 1216; re-en. Sec. 7928, R.C.M. 1935; R.C.M. 1947, 2-101.

28-10-102. General versus special agents. An agent for a particular act or transaction is called a special agent. All others are general agents.

History: En. Sec. 3072, Civ. C. 1895; re-en. Sec. 5415, Rev. C. 1907; re-en. Sec. 7930, R.C.M. 1921; Cal. Civ. C. Sec. 2297; Field Civ. C. Sec. 1218; re-en. Sec. 7930, R.C.M. 1935; R.C.M. 1947, 2-103.

28-10-103. Actual versus ostensible agency. An agency is either actual or ostensible. An agency is actual when the agent is really employed by the principal. An agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent who is not really employed by him.

History: En. Secs. 3073, 3074, 3075, Civ. C. 1895; re-en. Secs. 5416, 5417, 5418, Rev. C. 1907; re-en. Secs. 7931, 7932, 7933, R.C.M. 1921; Cal. Civ. C. Secs. 2298, 2299, 2300; Field Civ. C. Secs. 1219, 1220, 1221; re-en. Secs. 7931, 7932, 7933, R.C.M. 1935; R.C.M. 1947, 2-104, 2-105, 2-106.

28-10-104. Who may appoint an agent, who may be an agent. Any person having capacity to contract may appoint an agent, and any person may be an agent. A minor cannot give a delegation of power.

History: En. Secs. 16, 3071, Civ. C. 1895; re-en. Secs. 3590, 5414, Rev. C. 1907; re-en. Secs. 5678, 7929, R.C.M. 1921; Cal. Civ. C. Secs. 33, 2296; Field Civ. C. Secs. 15, 1217; re-en. Secs. 5678, 7929, R.C.M. 1935; R.C.M. 1947, 2-102, 64-105.

28-10-105. What acts agent may perform. (1) An agent may be authorized to do any acts which his principal might do, except those to which the latter is bound to give his personal attention.

(2) Every act which, according to this code, may be done by or to any person may be done by or to the agent of such person for that purpose unless a contrary intention clearly appears.

History: En. Secs. 3080, 3081, Civ. C. 1895; re-en. Secs. 5419, 5420, Rev. C. 1907; re-en. Secs. 7934, 7935, R.C.M. 1921; Cal. Civ. C. Secs. 2304, 2305; Field Civ. C. Secs. 1222, 1223; re-en. Secs. 7934, 7935, R.C.M. 1935; R.C.M. 1947, 2-107, 2-108.

Part 2

Creation of Agency

28-10-201. How agency may be created. An agency may be created and an authority may be conferred by a precedent authorization or a subsequent ratification.

History: En. Sec. 3083, Civ. C. 1895; re-en. Sec. 5422, Rev. C. 1907; re-en. Sec. 7937, R.C.M. 1921; Cal. Civ. C. Sec. 2307; Field Civ. C. Sec. 1225; re-en. Sec. 7937, R.C.M. 1935; R.C.M. 1947, 2-114.

28-10-202. Consideration unnecessary. A consideration is not necessary to make an authority, whether precedent or subsequent, binding upon the principal.

History: En. Sec. 3084, Civ. C. 1895; re-en. Sec. 5423, Rev. C. 1907; re-en. Sec. 7938, R.C.M. 1921; Cal. Civ. C. Sec. 2308; Field Civ. C. Sec. 1226; re-en. Sec. 7938, R.C.M. 1935; R.C.M. 1947, 2-115.

28-10-203. When written authorization necessary. An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing.

History: En. Sec. 3085, Civ. C. 1895; re-en. Sec. 5424, Rev. C. 1907; re-en. Sec. 7939, R.C.M. 1921; Cal. Civ. C. Sec. 2309; Based on Field Civ. C. Sec. 1227; re-en. Sec. 7939, R.C.M. 1935; R.C.M. 1947, 2-116.

28-10-204 through 28-10-210 reserved.

28-10-211. How agent's act ratified. A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified or, where an oral authorization would suffice, by accepting or restraining the benefit of the act, with notice thereof.

History: En. Sec. 3086, Civ. C. 1895; re-en. Sec. 5425, Rev. C. 1907; re-en. Sec. 7940, R.C.M. 1921; Cal. Civ. C. Sec. 2310; Field Civ. C. Sec. 1228; re-en. Sec. 7940, R.C.M. 1935; R.C.M. 1947, 2-117.

28-10-212. Ratification of part of indivisible transaction. Ratification of part of an indivisible transaction is a ratification of the whole.

History: En. Sec. 3087, Civ. C. 1895; re-en. Sec. 5426, Rev. C. 1907; re-en. Sec. 7941, R.C.M. 1921; Cal. Civ. C. Sec. 2311; Field Civ. C. Sec. 1229; re-en. Sec. 7941, R.C.M. 1935; R.C.M. 1947, 2-118.

28-10-213. Ratification not to prejudice third persons. No unauthorized act can be made valid retroactively to the prejudice of third persons without their consent.

History: En. Sec. 3089, Civ. C. 1895; re-en. Sec. 5428, Rev. C. 1907; re-en. Sec. 7943, R.C.M. 1921; Cal. Civ. C. Sec. 2313; Field Civ. C. Sec. 1231; re-en. Sec. 7943, R.C.M. 1935; R.C.M. 1947, 2-120.

28-10-214. When ratification void. A ratification is not valid unless, at the time of ratifying the act done, the principal has power to confer authority for such an act.

History: En. Sec. 3088, Civ. C. 1895; re-en. Sec. 5427, Rev. C. 1907; re-en. Sec. 7942, R.C.M. 1921; Cal. Civ. C. Sec. 2312; Field Civ. C. Sec. 1230; re-en. Sec. 7942, R.C.M. 1935; R.C.M. 1947, 2-119.

28-10-215. When ratification may be rescinded. A ratification may be rescinded when made without such consent as is required in a contract or with an imperfect knowledge of the material facts of the transaction ratified, but not otherwise.

History: En. Sec. 3090, Civ. C. 1895; re-en. Sec. 5429, Rev. C. 1907; re-en. Sec. 7944, R.C.M. 1921; Cal. Civ. C. Sec. 2314; Field Civ. C. Sec. 1232; re-en. Sec. 7944, R.C.M. 1935; R.C.M. 1947, 2-121.

Part 3

Duties of Agent

28-10-301. Agent not to exceed actual authority. An agent must not exceed the limits of his actual authority as defined by parts 1, 2, and 4 through 8 of this chapter and parts 5 and 6 of chapter 11 of Title 30.

History: En. Sec. 2740, Civ. C. 1895; re-en. Sec. 5286, Rev. C. 1907; re-en. Sec. 7801, R.C.M. 1921; Cal. Civ. C. Sec. 2019; Field Civ. C. Sec. 1041; re-en. Sec. 7801, R.C.M. 1935; R.C.M. 1947, 2-109.

28-10-302. Duty to keep principal informed. An agent must use ordinary diligence to keep his principal informed of his acts in the course of the agency.

History: En. Sec. 2741, Civ. C. 1895; re-en. Sec. 5287, Rev. C. 1907; re-en. Sec. 7802, R.C.M. 1921; Cal. Civ. C. Sec. 2020; Field Civ. C. Sec. 1042; re-en. Sec. 7802, R.C.M. 1935; R.C.M. 1947, 2-110.

28-10-303. Duty of agent employed to collect negotiable instrument. An agent employed to collect a negotiable instrument must collect it promptly and take all measures necessary to charge the parties thereto in case of its dishonor and, if it is a bill of exchange, present it for acceptance with reasonable diligence.

History: En. Sec. 2742, Civ. C. 1895; re-en. Sec. 5288, Rev. C. 1907; re-en. Sec. 7803, R.C.M. 1921; Cal. Civ. C. Sec. 2021; Field Civ. C. Sec. 1043; re-en. Sec. 7803, R.C.M. 1935; R.C.M. 1947, 2-111.

Part 4

Authority of Agent

28-10-401. What authority agent has. An agent has such authority as the principal actually or ostensibly confers upon him.

History: En. Sec. 3091, Civ. C. 1895; re-en. Sec. 5430, Rev. C. 1907; re-en. Sec. 7945, R.C.M. 1921; Cal. Civ. C. Sec. 2315; Field Civ. C. Sec. 1233; re-en. Sec. 7945, R.C.M. 1935; R.C.M. 1947, 2-122.

28-10-402. Actual authority defined. Actual authority is such as the principal intentionally confers upon the agent or intentionally or by want of ordinary care allows the agent to believe himself to possess.

History: En. Sec. 3092, Civ. C. 1895; re-en. Sec. 5431, Rev. C. 1907; re-en. Sec. 7946, R.C.M. 1921; Cal. Civ. C. Sec. 2316; Field Civ. C. Sec. 1234; re-en. Sec. 7946, R.C.M. 1935; R.C.M. 1947, 2-123.

28-10-403. Ostensible authority defined. Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.

History: En. Sec. 3093, Civ. C. 1895; re-en. Sec. 5432, Rev. C. 1907; re-en. Sec. 7947, R.C.M. 1921; Cal. Civ. C. Sec. 2317; Field Civ. C. Sec. 1235; re-en. Sec. 7947, R.C.M. 1935; R.C.M. 1947, 2-124.

28-10-404. When and as to whom agent's authority restricted. Every agent has actually such authority as is defined by this part, parts 1, 2, and 5 through 8 of this chapter, and parts 5 and 6 of chapter 11 of Title 30 unless specially deprived thereof by his principal and has even then such authority ostensibly except as to persons who have actual or constructive notice of the restriction upon his authority.

History: En. Sec. 3094, Civ. C. 1895; re-en. Sec. 5433, Rev. C. 1907; re-en. Sec. 7948, R.C.M. 1921; Cal. Civ. C. Sec. 2318; Field Civ. C. Sec. 1236; re-en. Sec. 7948, R.C.M. 1935; R.C.M. 1947, 2-125.

28-10-405. Implied powers of agent. An agent has authority to:

(1) do everything necessary and proper and usual, in the ordinary course of business, for effecting the purpose of his agency; and

(2) make a representation respecting any matter of fact, not including the terms of his authority, but upon which his right to use his authority depends and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made.

History: En. Sec. 3095, Civ. C. 1895; re-en. Sec. 5434, Rev. C. 1907; re-en. Sec. 7949, R.C.M. 1921; Cal. Civ. C. Sec. 2319; Field Civ. C. Sec. 1237; re-en. Sec. 7949, R.C.M. 1935; R.C.M. 1947, 2-126.

28-10-406. Interpretation of authority given partly in general and partly in specific terms. When an authority is given partly in general and partly in specific terms, the general authority gives no higher powers than those specifically mentioned.

History: En. Sec. 3097, Civ. C. 1895; re-en. Sec. 5436, Rev. C. 1907; re-en. Sec. 7951, R.C.M. 1921; Cal. Civ. C. Sec. 2321; Field Civ. C. Sec. 1239; re-en. Sec. 7951, R.C.M. 1935; R.C.M. 1947, 2-128.

28-10-407. Statutory exceptions to general authority. An authority expressed in general terms, however broad, does not authorize an agent to:

(1) act in his own name unless it is the usual course of business to do so;

(2) define the scope of his agency; or

(3) do any act which a trustee is forbidden to do by Title 72, chapter 20, part 2.

History: En. Sec. 3098, Civ. C. 1895; re-en. Sec. 5437, Rev. C. 1907; re-en. Sec. 7952, R.C.M. 1921; Cal. Civ. C. Sec. 2322; Field Civ. C. Sec. 1240; re-en. Sec. 7952, R.C.M. 1935; R.C.M. 1947, 2-129.

28-10-408. When agent may disobey instructions. An agent has power to disobey instructions in dealing with the subject of the agency in cases where it is clearly for the interest of his principal that he should do so and there is not time to communicate with the principal.

History: En. Sec. 3096, Civ. C. 1895; re-en. Sec. 5435, Rev. C. 1907; re-en. Sec. 7950, R.C.M. 1921; Cal. Civ. C. Sec. 2320; Field Civ. C. Sec. 1238; re-en. Sec. 7950, R.C.M. 1935; R.C.M. 1947, 2-127.

28-10-409. No authority to defraud principal. An agent can never have authority, either actual or ostensible, to do an act which is and is known or suspected by the person with whom he deals to be a fraud upon the principal.

History: En. Sec. 3082, Civ. C. 1895; re-en. Sec. 5421, Rev. C. 1907; re-en. Sec. 7936, R.C.M. 1921; Cal. Civ. C. Sec. 2306; Field Civ. C. Sec. 1224; re-en. Sec. 7936, R.C.M. 1935; R.C.M. 1947, 2-113.

28-10-410 through 28-10-420 reserved.

28-10-421. What included in authority to sell personal property. An authority to sell personal property includes authority to warrant the title of the principal and the quantity and quality of the property.

History: En. Sec. 3099, Civ. C. 1895; re-en. Sec. 5438, Rev. C. 1907; re-en. Sec. 7953, R.C.M. 1921; Cal. Civ. C. Sec. 2323; Field Civ. C. Sec. 1241; re-en. Sec. 7953, R.C.M. 1935; R.C.M. 1947, 2-130.

28-10-422. What included in authority to sell real property. An authority to sell and convey real property includes authority to give the usual covenants of warranty.

History: En. Sec. 3100, Civ. C. 1895; re-en. Sec. 5439, Rev. C. 1907; re-en. Sec. 7954, R.C.M. 1921; Cal. Civ. C. Sec. 2324; Field Civ. C. Sec. 1242; re-en. Sec. 7954, R.C.M. 1935; R.C.M. 1947, 2-131.

28-10-423. Authority of agent to sell to receive price. A general agent to sell who is entrusted by the principal with the possession of the thing sold has authority to receive the price. A special agent to sell has authority to receive the price on delivery of the thing sold, but not afterwards.

History: En. Secs. 3101, 3102, Civ. C. 1895; re-en. Secs. 5440, 5441, Rev. C. 1907; re-en. Secs. 7955, 7956, R.C.M. 1921; Cal. Civ. C. Secs. 2325, 2326; Field Civ. C. Secs. 1243, 1244; re-en. Secs. 7955, 7956, R.C.M. 1935; R.C.M. 1947, 2-132, 2-133.

Part 5

Subagents

28-10-501. When agent may delegate powers. An agent, unless specially forbidden by his principal to do so, can delegate his powers to another person in any of the following cases and in no others:

(1) when the act to be done is purely mechanical;

(2) when it is such as the agent cannot himself and the subagent can lawfully perform;

(3) when it is the usage of the place to delegate such powers; or

(4) when such delegation is specially authorized by the principal.

History: En. Sec. 3140, Civ. C. 1895; re-en. Sec. 5456, Rev. C. 1907; re-en. Sec. 7971, R.C.M. 1921; Cal. Civ. C. Sec. 2349; Field Civ. C. Sec. 1259; re-en. Sec. 7971, R.C.M. 1935; R.C.M. 1947, 2-301.

28-10-502. Effect of unauthorized employment of subagent. If an agent employs a subagent without authority, the former is a principal and the latter his agent and the principal of the former has no connection with the latter. A mere agent of an agent is not responsible as such to the principal of the latter.

History: En. Secs. 2743, 3141, Civ. C. 1895; re-en. Secs. 5289, 5457, Rev. C. 1907; re-en. Secs. 7804, 7972, R.C.M. 1921; Cal. Civ. C. Secs. 2022, 2350; Field Civ. C. Secs. 1044, 1260; re-en. Secs. 7804, 7972, R.C.M. 1935; R.C.M. 1947, 2-112, 2-302.

28-10-503. Effect of authorized employment of subagent. A subagent lawfully appointed represents the principal in like manner with the original agent, and the original agent is not responsible to third persons for the acts of the subagent.

History: En. Sec. 3142, Civ. C. 1895; re-en. Sec. 5458, Rev. C. 1907; re-en. Sec. 7973, R.C.M. 1921; Cal. Civ. C. Sec. 2351; Field Civ. C. Sec. 1261; re-en. Sec. 7973, R.C.M. 1935; R.C.M. 1947, 2-303.

Part 6

Rights and Liabilities of Principal

28-10-601. Accural of rights and liabilities to principal. An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal.

History: En. Sec. 3110, Civ. C. 1895; re-en. Sec. 5442, Rev. C. 1907; re-en. Sec. 7957, R.C.M. 1921; Cal. Civ. C. Sec. 2330; Field Civ. C. Sec. 1245; re-en. Sec. 7957, R.C.M. 1935; R.C.M. 1947, 2-201.

28-10-602. Principal's responsibility for agent's negligence, omissions, and wrongs. (1) Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.

(2) A principal is responsible for no other wrongs committed by his agent than those mentioned in subsection (1) unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service.

History: En. Secs. 3118, 3119, Civ. C. 1895; re-en. Secs. 5450, 5451, Rev. C. 1907; re-en. Secs. 7965, 7966, R.C.M. 1921; Cal. Civ. C. Secs. 2338, 2339; Field Civ. C. Secs. 1253, 1254; re-en. Secs. 7965, 7966, R.C.M. 1935; R.C.M. 1947, 2-209, 2-210.

28-10-603. When instrument binds principal. An instrument within the scope of his authority by which an agent intends to bind his principal does bind him if such intent is plainly inferable from the instrument itself.

History: En. Sec. 3117, Civ. C. 1895; re-en. Sec. 5449, Rev. C. 1907; re-en. Sec. 7964, R.C.M. 1921; Cal. Civ. C. Sec. 2337; Field Civ. C. Sec. 1252; re-en. Sec. 7964, R.C.M. 1935; R.C.M. 1947, 2-208.

28-10-604. When notice to principal or agent is notice to the other. As against a principal, both principal and agent are deemed to have notice of whatever either has notice of and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.

History: En. Sec. 3112, Civ. C. 1895; re-en. Sec. 5444, Rev. C. 1907; re-en. Sec. 7959, R.C.M. 1921; Cal. Civ. C. Sec. 2332; Field Civ. C. Sec. 1247; re-en. Sec. 7959, R.C.M. 1935; R.C.M. 1947, 2-203.

28-10-605. Extent to which principal bound when agent exceeds authority. When an agent exceeds his authority, his principal is bound by his authorized acts only so far as they can be plainly separated from those which are unauthorized.

History: En. Sec. 3113, Civ. C. 1895; re-en. Sec. 5445, Rev. C. 1907; re-en. Sec. 7960, R.C.M. 1921; Cal. Civ. C. Sec. 2333; Field Civ. C. Sec. 1248; re-en. Sec. 7960, R.C.M. 1935; R.C.M. 1947, 2-204.

28-10-606. Extent to which principal bound by acts under ostensible authority. A principal is bound by acts of his agent under a merely ostensible authority to those persons only who have in good faith and without ordinary negligence incurred a liability or parted with value upon the faith thereof.

History: En. Sec. 3114, Civ. C. 1895; re-en. Sec. 5446, Rev. C. 1907; re-en. Sec. 7961, R.C.M. 1921; Cal. Civ. C. Sec. 2334; Field Civ. C. Sec. 1249; re-en. Sec. 7961, R.C.M. 1935; R.C.M. 1947, 2-205.

28-10-607. When principal bound by incomplete execution of authority. A principal is bound by an incomplete execution of an authority when it is consistent with the whole purpose and scope thereof, but not otherwise.

History: En. Sec. 3111, Civ. C. 1895; re-en. Sec. 5443, Rev. C. 1907; re-en. Sec. 7958, R.C.M. 1921; Cal. Civ. C. Sec. 2331; Field Civ. C. Sec. 1246; re-en. Sec. 7958, R.C.M. 1935; R.C.M. 1947, 2-202.

28-10-608. Rights of person who deals with agent without knowledge of agency. One who deals with an agent without knowing or having reason to believe that the agent acts as such in the transaction may set off against any claim of the principal arising out of the same all claims which he might have set off against the agent before notice of the agency.

History: En. Sec. 3116, Civ. C. 1895; re-en. Sec. 5448, Rev. C. 1907; re-en. Sec. 7963, R.C.M. 1921; Cal. Civ. C. Sec. 2336; Field Civ. C. Sec. 1251; re-en. Sec. 7963, R.C.M. 1935; R.C.M. 1947, 2-207.

28-10-609. Principal's liability when agent given exclusive credit. If exclusive credit is given to an agent by the person dealing with him, his principal is exonerated by payment or other satisfaction made by him to his agent in good faith before receiving notice of the creditor's election to hold him responsible.

History: En. Sec. 3115, Civ. C. 1895; re-en. Sec. 5447, Rev. C. 1907; re-en. Sec. 7962, R.C.M. 1921; Cal. Civ. C. Sec. 2335; Field Civ. C. Sec. 1250; re-en. Sec. 7962, R.C.M. 1935; R.C.M. 1947, 2-206.

Part 7

Agent's Responsibility to Third Persons

28-10-701. Warranty of authority. One who assumes to act as an agent thereby warrants to all who deal with him in that capacity that he has the authority which he assumes.

History: En. Sec. 3130, Civ. C. 1895; re-en. Sec. 5452, Rev. C. 1907; re-en. Sec. 7967, R.C.M. 1921; Cal. Civ. C. Sec. 2342; Field Civ. C. Sec. 1255; re-en. Sec. 7967, R.C.M. 1935; R.C.M. 1947, 2-211.

28-10-702. When agent responsible to third persons as a principal. One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency in any of the following cases and in no other:

(1) when, with his consent, credit is given to him personally in a transaction;

(2) when he enters into a written contract in the name of his principal without believing in good faith that he has authority to do so; or

(3) when his acts are wrongful in their nature.

History: En. Sec. 3131, Civ. C. 1895; re-en. Sec. 5453, Rev. C. 1907; re-en. Sec. 7968, R.C.M. 1921; Cal. Civ. C. Sec. 2343; Field Civ. C. Sec. 1256; re-en. Sec. 7968, R.C.M. 1935; R.C.M. 1947, 2-212.

28-10-703. Responsibility of agent when third person claims property received for principal. If an agent receives anything for the benefit of his principal to the possession of which another person is entitled, he must, on demand, surrender it to such person, or so much of it as he has under his control at the time of demand, on being indemnified for any advance which he has made to his principal, in good faith, on account of the same and is responsible therefor if, after notice to the owner, he delivers it to his principal.

History: En. Sec. 3132, Civ. C. 1895; re-en. Sec. 5454, Rev. C. 1907; re-en. Sec. 7969, R.C.M. 1921; Cal. Civ. C. Sec. 2344; Field Civ. C. Sec. 1257; re-en. Sec. 7969, R.C.M. 1935; R.C.M. 1947, 2-213.

28-10-704. Applicability of laws relating to capacity to contract. The provisions of this part are subject to the provisions of 27-1-511, 27-1-711, 28-2-202 through 28-2-204, 28-10-104, and Title 41, chapter 1, parts 1 through 3, except 41-1-303.

History: En. Sec. 3133, Civ. C. 1895; re-en. Sec. 5455, Rev. C. 1907; re-en. Sec. 7970, R.C.M. 1921; Cal. Civ. C. Sec. 2345; Field Civ. C. Sec. 1258; re-en. Sec. 7970, R.C.M. 1935; R.C.M. 1947, 2-214.

Part 8

Termination of Agency

28-10-801. Circumstances which terminate any agency. An agency is terminated as to every person having notice thereof by:

(1) the expiration of its term;

(2) the extinction of its subject;

(3) the death of the agent;

(4) his renunciation of the agency; or

(5) the incapacity of the agent to act as such.

History: En. Sec. 3150, Civ. C. 1895; re-en. Sec. 5459, Rev. C. 1907; re-en. Sec. 7974, R.C.M. 1921; Cal. Civ. C. Sec. 2355; Field Civ. C. Sec. 1262; re-en. Sec. 7974, R.C.M. 1935; R.C.M. 1947, 2-304.

28-10-802. Circumstances which terminate agency not coupled with an interest. Unless the power of the agent is coupled with an interest in the subject of the agency, it is terminated as to every person having notice thereof by:

(1) its revocation by the principal;

(2) his death; or

(3) his incapacity to contract.

History: En. Sec. 3151, Civ. C. 1895; re-en. Sec. 5460, Rev. C. 1907; re-en. Sec. 7975, R.C.M. 1921; Cal. Civ. C. Sec. 2356; Field Civ. C. Sec. 1263; re-en. Sec. 7975, R.C.M. 1935; R.C.M. 1947, 2-305.

CHAPTER 11

GUARANTY, INDEMNITY, AND SURETYSHIP

Part 1 — Guaranty—General Provisions

Section
28-11-101. Guaranty defined.
28-11-102. Knowledge or consent of principal not required.
28-11-103. When separate consideration required.
28-11-104. Guaranty generally to be in writing — form.
28-11-105. When guaranty considered original obligation and need not be in writing.
28-11-106. When notice of acceptance necessary to bind guarantor.
28-11-107. When guaranty considered unconditional.
28-11-108. Continuing guaranty — definition, revocation.

Part 2 — Guaranty
Liability and Exoneration of Guarantor

28-11-201. Obligation of guarantor not to exceed that of principal.
28-11-202. Liability under guaranty of incomplete contract.
28-11-203. Liability under guaranty of illegal contract or contract void against principal.
28-11-204. Liability under guaranty that obligation is good or collectable.
28-11-205. When guarantor of payment or performance becomes liable.
28-11-206. Liability upon guaranty of conditional obligation — notice of default.
Sections 28-11-207 through 28-11-210 reserved.
28-11-211. When guarantor exonerated.
28-11-212. Recission of alteration — liability not restored.
28-11-213. Guarantor not exonerated by delay of creditor.
28-11-214. Guarantor not exonerated by discharge of principal.
28-11-215. Exoneration of guarantor indemnified by principal.
28-11-216. Effect of part performance on guarantor's liability.

Part 3 — Indemnity

28-11-301. Indemnity defined.
28-11-302. Indemnity for future unlawful act void.
28-11-303. Indemnity for past wrongful act valid.
28-11-304. Indemnity extended to acts of agents.
28-11-305. Indemnification of several persons.
Sections 28-11-306 through 28-11-310 reserved.
28-11-311. Person indemnifying liable jointly and severally.
28-11-312. When person indemnifying entitled to reimbursement.
28-11-313. Interpretation of contract of indemnity.
28-11-314. When and what person indemnified entitled to recover.
28-11-315. Costs of defense.
28-11-316. Duty of person indemnifying to defend.
28-11-317. When judgment not conclusive against person indemnifying.

Part 4 — Suretyship

28-11-401. Surety defined.
28-11-402. When apparent principal may show he is a surety.
28-11-403. Interpretation of contract of suretyship.
28-11-404. Suretyship unaffected by judgment against surety.
Sections 28-11-405 through 28-11-410 reserved.
28-11-411. Extent of surety's liability.
28-11-412. Exoneration of surety.
28-11-413. Effect of performance or offer of performance on surety's liability.
28-11-414. Application to surety of rights of guarantor.
28-11-415. Power of surety to compel principal to perform.

28-11-416. When surety may require creditor to pursue remedy.
28-11-417. Surety's right to reimbursement and contribution.
28-11-418. Surety entitled to benefit of security held by creditor or cosurety.
28-11-419. Creditor entitled to benefit of security held by surety.
28-11-420. Principal's property to be taken first.

Part 1

Guaranty — General Provisions

28-11-101. Guaranty defined. A guaranty is a promise to answer for the debt, default, or miscarriage of another person.

History: En. Sec. 3600, Civ. C. 1895; re-en. Sec. 5656, Rev. C. 1907; re-en. Sec. 8171, R.C.M. 1921; Cal. Civ. C. Sec. 2787; Field Civ. C. Sec. 1534; re-en. Sec. 8171, R.C.M. 1935; R.C.M. 1947, 30-101.

28-11-102. Knowledge or consent of principal not required. A person may become guarantor even without the knowledge or consent of the principal.

History: En. Sec. 3601, Civ. C. 1895; re-en. Sec. 5657, Rev. C. 1907; re-en. Sec. 8172, R.C.M. 1921; Cal. Civ. C. Sec. 2788; Field Civ. C. Sec. 1535; re-en. Sec. 8172, R.C.M. 1935; R.C.M. 1947, 30-102.

28-11-103. When separate consideration required. Where a guaranty is entered into at the same time with the original obligation or with the acceptance of the latter by the guarantee and forms with that obligation a part of the consideration to him, no other consideration need exist. In all other cases, there must be a consideration distinct from that of the original obligation.

History: En. Sec. 3610, Civ. C. 1895; re-en. Sec. 5658, Rev. C. 1907; re-en. Sec. 8173, R.C.M. 1921; Cal. Civ. C. Sec. 2792; Field Civ. C. Sec. 1536; re-en. Sec. 8173, R.C.M. 1935; R.C.M. 1947, 30-103.

28-11-104. Guaranty generally to be in writing — form. Except as prescribed by 28-11-105, a guaranty must be in writing and signed by the guarantor, but the writing need not express a consideration.

History: En. Sec. 3611, Civ. C. 1895; re-en. Sec. 5659, Rev. C. 1907; re-en. Sec. 8174, R.C.M. 1921; Cal. Civ. C. Sec. 2793; Field Civ. C. Sec. 1537; re-en. Sec. 8174, R.C.M. 1935; R.C.M. 1947, 30-104.

28-11-105. When guaranty considered original obligation and need not be in writing. A promise to answer for the obligation of another in any of the following cases is deemed an original obligation of the promisor and need not be in writing:

(1) where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise or by one who has received a discharge from an obligation, in whole or in part, in consideration of such promise;

(2) where the creditor parts with value or enters into an obligation in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor and the person in whose behalf it is made his surety;

(3) where the promise, being for an antecedent obligation of another, is made upon a consideration:

(a) that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor;

(b) that the party receiving it releases the property of another from a levy; or

(c) beneficial to the promisor, whether moving from either party to the antecedent obligation or from another person;

(4) where a factor undertakes to sell merchandise for a commission and guarantee the sale;

(5) where the holder of an instrument for the payment of money upon which a third person is or may become liable to him transfers it in payment of a precedent debt of his own or for a new consideration and in connection with such transfer enters into a promise respecting such instrument.

History: En. Sec. 3612, Civ. C. 1895; re-en. Sec. 5660, Rev. C. 1907; re-en. Sec. 8175, R.C.M. 1921; Cal. Civ. C. Sec. 2794; Field Civ. C. Sec. 1538; re-en. Sec. 8175, R.C.M. 1935; R.C.M. 1947, 30-105.

28-11-106. When notice of acceptance necessary to bind guarantor. A mere offer of guaranty is not binding until notice of its acceptance is communicated by the guarantee to the guarantor, but an absolute guaranty is binding upon the guarantor without notice of acceptance.

History: En. Sec. 3613, Civ. C. 1895; re-en. Sec. 5661, Rev. C. 1907; re-en. Sec. 8176, R.C.M. 1921; Cal. Civ. C. Sec. 2795; Field Civ. C. Sec. 1539; re-en. Sec. 8176, R.C.M. 1935; amd. Sec. 6, Ch. 185, L. 1977; R.C.M. 1947, 30-106.

28-11-107. When guaranty considered unconditional. A guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor.

History: En. Sec. 3630, Civ. C. 1895; re-en. Sec. 5666, Rev. C. 1907; re-en. Sec. 8181, R.C.M. 1921; Cal. Civ. C. Sec. 2806; Field Civ. C. Sec. 1544; re-en. Sec. 8181, R.C.M. 1935; R.C.M. 1947, 30-201.

28-11-108. Continuing guaranty — definition, revocation. (1) A guaranty relating to a future liability of the principal under successive transactions which either continue his liability or from time to time renew it after it has been satisfied is called a continuing guaranty.

(2) A continuing guaranty may be revoked at any time by the guarantor in respect to future transactions unless there is a continuing consideration as to such transactions which he does not renounce.

History: En. Secs. 3640, 3641, Civ. C. 1895; re-en. Secs. 5671, 5672, Rev. C. 1907; re-en. Secs. 8186, 8187, R.C.M. 1921; Cal. Civ. C. Secs. 2814, 2815; Field Civ. C. Secs. 1549, 1550; re-en. Secs. 8186, 8187, R.C.M. 1935; R.C.M. 1947, 30-206, 30-207.

Part 2

Guaranty — Liability and Exoneration of Guarantor

28-11-201. Obligation of guarantor not to exceed that of principal. The obligation of a guarantor must be neither larger in amount nor in other respects more burdensome than that of the principal, and if in its terms it exceeds it, it is reducible in proportion to the principal obligation.

History: En. Sec. 3633, Civ. C. 1895; re-en. Sec. 5669, Rev. C. 1907; re-en. Sec. 8184, R.C.M. 1921; Cal. Civ. C. Sec. 2809; Field Civ. C. Sec. 1547; re-en. Sec. 8184, R.C.M. 1935; R.C.M. 1947, 30-204.

28-11-202. Liability under guaranty of incomplete contract. In a guaranty of a contract the terms of which are not then settled, it is implied that its terms shall be such as will not expose the guarantor to greater risks than he would incur under those terms which are most common in similar contracts at the place where the principal contract is to be performed.

History: En. Sec. 3620, Civ. C. 1895; re-en. Sec. 5662, Rev. C. 1907; re-en. Sec. 8177, R.C.M. 1921; Cal. Civ. C. Sec. 2799; Field. Civ. C. Sec. 1540; re-en. Sec. 8177, R.C.M. 1935; R.C.M. 1947, 30-107.

28-11-203. Liability under guaranty of illegal contract or contract void against principal. A guarantor is not liable if the contract of the principal is unlawful, but he is liable notwithstanding any mere personal disability of the principal, though the disability be such as to make the contract void against the principal.

History: En. Sec. 3634, Civ. C. 1895; re-en. Sec. 5670, Rev. C. 1907; re-en. Sec. 8185, R.C.M. 1921; Cal. Civ. C. Sec. 2810; Field Civ. C. Sec. 1548; re-en. Sec. 8185, R.C.M. 1935; R.C.M. 1947, 30-205.

28-11-204. Liability under guaranty that obligation is good or collectable. (1) A guaranty to the effect that an obligation is good or is collectable imports that the debtor is solvent and that the demand is collectable by the usual legal proceedings if taken with reasonable diligence.

(2) A guaranty such as is mentioned in subsection (1) is not discharged by an omission to take proceedings upon the principal debt or upon any collateral security for its payment if no part of the debt could have been collected thereby.

(3) In the case mentioned in subsection (1), the removal of the principal from the state, leaving no property therein from which the obligation might be satisfied, is equivalent to the insolvency of the principal in its effect upon the rights and obligations of the guarantor.

History: En. Secs. 3621, 3622, 3623, Civ. C. 1895; re-en. Secs. 5663, 5664, 5665, Rev. C. 1907; re-en. Secs. 8178, 8179, 8180, R.C.M. 1921; Cal. Civ. C. Secs. 2800, 2801, 2802; Field Civ. C. Secs. 1541, 1542, 1543; re-en. Secs. 8178, 8179, 8180, R.C.M. 1935; R.C.M. 1947, 30-108, 30-109, 30-110.

28-11-205. When guarantor of payment or performance becomes liable. A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal and without demand or notice.

History: En. Sec. 3631, Civ. C. 1895; re-en. Sec. 5667, Rev. C. 1907; re-en. Sec. 8182, R.C.M. 1921; Cal. Civ. C. Sec. 2807; Field Civ. C. Sec. 1545; re-en. Sec. 8182, R.C.M. 1935; R.C.M. 1947, 30-202.

28-11-206. Liability upon guaranty of conditional obligation — notice of default. Where one guarantees a conditional obligation, his liability is commensurate with that of the principal and he is not entitled to notice of the default of the principal unless he is unable, by the exercise of reasonable diligence, to acquire information of such default and the creditor has actual notice thereof.

History: En. Sec. 3632, Civ. C. 1895; re-en. Sec. 5668, Rev. C. 1907; re-en. Sec. 8183, R.C.M. 1921; Cal. Civ. C. Sec. 2808; Field Civ. C. Sec 1546; re-en. Sec. 8183, R.C.M. 1935; R.C.M. 1947, 30-203.

28-11-207 through 28-11-210 reserved.

28-11-211. When guarantor exonerated. (1) A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor without the consent of the guarantor the original obligation of the principal is altered in any respect or the remedies or rights of the creditor against the principal in respect thereto are in any way impaired or suspended.

(2) A promise by a creditor which for any cause is void or voidable by him at his option does not alter the obligation or suspend or impair the remedy within the meaning of subsection (1).

History: En. Secs. 3650, 3651, Civ. C. 1895; re-en. Secs. 5673, 5674, Rev. C. 1907; re-en. Secs. 8188, 8189, R.C.M. 1921; Cal. Civ. C. Secs. 2819, 2820; Field Civ. C. Secs. 1551, 1552; re-en. Secs. 8188, 8189, R.C.M. 1935; R.C.M. 1947, 30-208, 30-209.

28-11-212. Rescission of alteration — liability not restored. The rescission of an agreement altering the original obligation of a debtor or impairing the remedy of a creditor does not restore the liability of a guarantor who has been exonerated by such agreement.

History: En. Sec. 3652, Civ. C. 1895; re-en. Sec. 5675, Rev. C. 1907; re-en. Sec. 8190, R.C.M. 1921; Cal. Civ. C. Sec. 2821; Field Civ. C. Sec. 1553; re-en. Sec. 8190, R.C.M. 1935; R.C.M. 1947, 30-210.

28-11-213. Guarantor not exonerated by delay of creditor. Mere delay on the part of a creditor to proceed against the principal or to enforce any other remedy does not exonerate a guarantor.

History: En. Sec. 3654, Civ. C. 1895; re-en. Sec. 5677, Rev. C. 1907; re-en. Sec. 8192, R.C.M. 1921; Cal. Civ. C. Sec. 2823; Field Civ. C. Sec. 1555; re-en. Sec. 8192, R.C.M. 1935; R.C.M. 1947, 30-212.

28-11-214. Guarantor not exonerated by discharge of principal. A guarantor is not exonerated by the discharge of his principal by operation of law without the intervention or omission of the creditor.

History: En. Sec. 3656, Civ. C. 1895; re-en. Sec. 5679, Rev. C. 1907; re-en. Sec. 8194, R.C.M. 1921; Cal. Civ. C. Sec. 2825; Field Civ. C. Sec. 1557; re-en. Sec. 8194, R.C.M. 1935; R.C.M. 1947, 30-214.

28-11-215. Exoneration of guarantor indemnified by principal. A guarantor who has been indemnified by the principal is liable to the creditor to the extent of the indemnity notwithstanding that the creditor, without the assent of the guarantor, may have modified the contract or released the principal.

History: En. Sec. 3655, Civ. C. 1895; re-en. Sec. 5678, Rev. C. 1907; re-en. Sec. 8193, R.C.M. 1921; Cal. Civ. C. Sec. 2824; Field Civ. C. Sec. 1556; re-en. Sec. 8193, R.C.M. 1935; R.C.M. 1947, 30-213.

28-11-216. Effect of part performance on guarantor's liability. The acceptance by a creditor of anything in partial satisfaction of an obligation reduces the obligation of a guarantor thereof in the same measure as that of the principal but does not otherwise affect it.

History: En. Sec. 3653, Civ. C. 1895; re-en. Sec. 5676, Rev. C. 1907; re-en. Sec. 8191, R.C.M. 1921; Cal. Civ. C. Sec. 2822; Field Civ. C. Sec. 1554; re-en. Sec. 8191, R.C.M. 1935; R.C.M. 1947, 30-211.

Part 3

Indemnity

28-11-301. Indemnity defined. Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties or of some other person.

History: En. Sec. 3580, Civ. C. 1895; re-en. Sec. 5648, Rev. C. 1907; re-en. Sec. 8163, R.C.M. 1921; Cal. Civ. C. Sec. 2772; Field Civ. C. Sec. 1524; re-en. Sec. 8163, R.C.M. 1935; R.C.M. 1947, 30-301.

28-11-302. Indemnity for future unlawful act void. An agreement to indemnify a person against an act thereafter to be done is void if the act be known by such person, at the time of doing it, to be unlawful.

History: En. Sec. 3581, Civ. C. 1895; re-en. Sec. 5649, Rev. C. 1907; re-en. Sec. 8164, R.C.M. 1921; Cal. Civ. C. Sec. 2773; Field Civ. C. Sec. 1525; re-en. Sec. 8164, R.C.M. 1935; R.C.M. 1947, 30-302.

28-11-303. Indemnity for past wrongful act valid. An agreement to indemnify a person against an act already done is valid, even though the act was known to be wrongful, unless it was a felony.

History: En. Sec. 3582, Civ. C. 1895; re-en. Sec. 5650, Rev. C. 1907; re-en. Sec. 8165, R.C.M. 1921; Cal. Civ. C. Sec. 2774; Field Civ. C. Sec. 1526; re-en. Sec. 8165, R.C.M. 1935; R.C.M. 1947, 30-303.

28-11-304. Indemnity extended to acts of agents. An agreement to indemnify against the acts of a certain person applies not only to his acts and their consequences but also to those of his agents.

History: En. Sec. 3583, Civ. C. 1895; re-en. Sec. 5651, Rev. C. 1907; re-en. Sec. 8166, R.C.M. 1921; Cal. Civ. C. Sec. 2775; Field Civ. C. Sec. 1527; re-en. Sec. 8166, R.C.M. 1935; R.C.M. 1947, 30-304.

28-11-305. Indemnification of several persons. An agreement to indemnify several persons applies to each unless a contrary intention appears.

History: En. Sec. 3584, Civ. C. 1895; re-en. Sec. 5652, Rev. C. 1907; re-en. Sec. 8167, R.C.M. 1921; Cal. Civ. C. Sec. 2776; Field Civ. C. Sec. 1528; re-en. Sec. 8167, R.C.M. 1935; R.C.M. 1947, 30-305.

28-11-306 through 28-11-310 reserved.

28-11-311. Person indemnifying liable jointly and severally. One who indemnifies another against an act to be done by the latter is liable jointly with the person indemnified and separately to every person injured by such act.

History: En. Sec. 3585, Civ. C. 1895; re-en. Sec. 5653, Rev. C. 1907; re-en. Sec. 8168, R.C.M. 1921; Cal. Civ. C. Sec. 2777; Field Civ. C. Sec. 1529; re-en. Sec. 8168, R.C.M. 1935; R.C.M. 1947, 30-306.

28-11-312. When person indemnifying entitled to reimbursement. Where one at the request of another engages to answer in damages, whether liquidated or unliquidated, for any violation of duty on the part of the latter, he is entitled to be reimbursed in the same manner as a surety for whatever he may pay.

History: En. Sec. 3587, Civ. C. 1895; re-en. Sec. 5655, Rev. C. 1907; re-en. Sec. 8170, R.C.M. 1921; Cal. Civ. C. Sec. 2779; Field Civ. C. Sec. 1531; re-en. Sec. 8170, R.C.M. 1935; R.C.M. 1947, 30-308.

28-11-313. Interpretation of contract of indemnity. In the interpretation of a contract of indemnity, the rules prescribed in 28-11-314 through 28-11-317 are to be applied unless a contrary intention appears.

History: En. Sec. 3586, Civ. C. 1895; re-en. Sec. 5654, Rev. C. 1907; re-en. Sec. 8169, R.C.M. 1921; Cal. Civ. C. Sec. 2778; Field Civ. C. Sec. 1530; re-en. Sec. 8169, R.C.M. 1935; R.C.M. 1947, 30-307(part).

28-11-314. When and what person indemnified entitled to recover. (1) Upon an indemnity against liability, expressly or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable.

(2) Upon an indemnity against claims, demands, damages, or costs, expressly or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof.

History: En. Sec. 3586, Civ. C. 1895; re-en. Sec. 5654, Rev. C. 1907; re-en. Sec. 8169, R.C.M. 1921; Cal. Civ. C. Sec. 2778; Field Civ. C. Sec. 1530; re-en. Sec. 8169, R.C.M. 1935; R.C.M. 1947, 30-307(1), (2).

28-11-315. Costs of defense. An indemnity against claims, demands, or liability, expressly or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith and in the exercise of a reasonable discretion.

History: En. Sec. 3586, Civ. C. 1895; re-en. Sec. 5654, Rev. C. 1907; re-en. Sec. 8169, R.C.M. 1921; Cal. Civ. C. Sec. 2778; Field Civ. C. Sec. 1530; re-en. Sec. 8169, R.C.M. 1935; R.C.M. 1947, 30-307(3).

28-11-316. Duty of person indemnifying to defend. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses if he chooses to do so. If after request the person indemnifying neglects to defend the person indemnified, a recovery against the latter suffered by him in good faith is conclusive in his favor against the former.

History: En. Sec. 3586, Civ. C. 1895; re-en. Sec. 5654, Rev. C. 1907; re-en. Sec. 8169, R.C.M. 1921; Cal. Civ. C. Sec. 2778; Field Civ. C. Sec. 1530; re-en. Sec. 8169, R.C.M. 1935; R.C.M. 1947, 30-307(4), (5).

28-11-317. When judgment not conclusive against person indemnifying. (1) If the person indemnifying, whether he is a principal or a surety in the agreement, does not have reasonable notice of the action or proceeding against the person indemnified or is not allowed to control his defense, judgment against the latter is only presumptive evidence against the former.

(2) A stipulation that a judgment against the person indemnified shall be conclusive upon the person indemnifying is inapplicable if he had a good defense upon the merits which by want of ordinary care he failed to establish in the action.

History: En. Sec. 3586, Civ. C. 1895; re-en. Sec. 5654, Rev. C. 1907; re-en. Sec. 8169, R.C.M. 1921; Cal. Civ. C. Sec. 2778; Field Civ. C. Sec. 1530; re-en. Sec. 8169, R.C.M. 1935; R.C.M. 1947, 30-307(6), (7).

Part 4

Suretyship

28-11-401. Surety defined. A surety is one who, at the request of another and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person or hypothecates property as security therefor.

History: En. Sec. 3670, Civ. C. 1895; re-en. Sec. 5680, Rev. C. 1907; re-en. Sec. 8195, R.C.M. 1921; Cal. Civ. C. Sec. 2831; Field Civ. C. Sec. 1558; re-en. Sec. 8195, R.C.M. 1935; R.C.M. 1947, 30-401.

28-11-402. When apparent principal may show he is a surety. One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety except as against persons who have acted on the faith of his apparent character of principal.

History: En. Sec. 3671, Civ. C. 1895; re-en. Sec. 5681, Rev. C. 1907; re-en. Sec. 8196, R.C.M. 1921; Cal. Civ. C. Sec. 2832; Field Civ. C. Sec. 1559; re-en. Sec. 8196, R.C.M. 1935; R.C.M. 1947, 30-402.

28-11-403. Interpretation of contract of suretyship. In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts.

History: En. Sec. 3681, Civ. C. 1895; re-en. Sec. 5683, Rev. C. 1907; re-en. Sec. 8198, R.C.M. 1921; Cal. Civ. C. Sec. 2837; Field Civ. C. Sec. 1561; re-en. Sec. 8198, R.C.M. 1935; R.C.M. 1947, 30-404.

28-11-404. Suretyship unaffected by judgment against surety. Notwithstanding the recovery of judgment by a creditor against a surety, the latter still occupies the relation of surety.

History: En. Sec. 3682, Civ. C. 1895; re-en. Sec. 5684, Rev. C. 1907; re-en. Sec. 8199, R.C.M. 1921; Cal. Civ. C. Sec. 2838; Field Civ. C. Sec. 1562; re-en. Sec. 8199, R.C.M. 1935; R.C.M. 1947, 30-405.

28-11-405 through 28-11-410 reserved.

28-11-411. Extent of surety's liability. A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty.

History: En. Sec. 3680, Civ. C. 1895; re-en. Sec. 5682, Rev. C. 1907; re-en. Sec. 8197, R.C.M. 1921; Cal. Civ. C. Sec. 2836; Field Civ. C. Sec. 1560; re-en. Sec. 8197, R.C.M. 1935; R.C.M. 1947, 30-403.

28-11-412. Exoneration of surety. A surety is exonerated:

(1) in like manner with a guarantor;

(2) to the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights or which lessens his security; or

(3) to the extent to which he is prejudiced by an omission of the creditor, when required by the surety, to do anything which it is the creditor's duty to do.

History: En. Sec. 3684, Civ. C. 1895; re-en. Sec. 5686, Rev. C. 1907; re-en. Sec. 8201, R.C.M. 1921; Cal. Civ. C. Sec. 2840; Field Civ. Sec. 1564; re-en. Sec. 8201, R.C.M. 1935; amd. Sec. 8, Ch. 185, L. 1977; R.C.M. 1947, 30-407.

28-11-413. Effect of performance or offer of performance on surety's liability. Performance of the principal obligation or an offer of such performance, duly made as provided in this code, exonerates a surety.

History: En. Sec. 3683, Civ. C. 1895; re-en. Sec. 5685, Rev. C. 1907; re-en. Sec. 8200, R.C.M. 1921; Cal. Civ. C. Sec. 2839; Based on Field Civ. C. Sec. 1563; re-en. Sec. 8200, R.C.M. 1935; R.C.M. 1947, 30-406.

28-11-414. Application to surety of rights of guarantor. A surety has all the right of a guarantor, whether he becomes personally responsible or not.

History: En. Sec. 3690, Civ. C. 1895; re-en. Sec. 5687, Rev. C. 1907; re-en. Sec. 8202, R.C.M. 1921; Cal. Civ. C. Sec. 2844; Field Civ. C. Sec. 1565; re-en. Sec. 8202, R.C.M. 1935; R.C.M. 1947, 30-501.

28-11-415. Power of surety to compel principal to perform. A surety may compel his principal to perform the obligations when due.

History: En. Sec. 3692, Civ. C. 1895; re-en. Sec. 5689, Rev. C. 1907; re-en. Sec. 8204, R.C.M. 1921; Cal. Civ. C. Sec. 2846; Field Civ. C. Sec. 1567; re-en. Sec. 8204, R.C.M. 1935; R.C.M. 1947, 30-503.

28-11-416. When surety may require creditor to pursue remedy. A surety may require his creditor to proceed against the principal or to pursue any other remedy in his power which the surety cannot himself pursue and which would lighten his burden, and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced.

History: En. Sec. 3691, Civ. C. 1895; re-en. Sec. 5688, Rev. C. 1907; re-en. Sec. 8203, R.C.M. 1921; Cal. Civ. C. Sec. 2845; Field Civ. C. Sec. 1566; re-en. Sec. 8203, R.C.M. 1935; R.C.M. 1947, 30-502.

28-11-417. Surety's right to reimbursement and contribution. (1) If a surety satisfies the principal obligation or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what the surety has disbursed, including necessary costs and expenses, but the surety has no claim for reimbursement against other persons, though they may have been benefited by his act, except as prescribed by subsection (2).

(2) A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what the surety has expended and also to require all his cosureties to contribute thereto without regard to the order of time in which they became such.

History: En. Secs. 3693, 3694, Civ. C. 1895; re-en. Secs. 5690, 5691, Rev. C. 1907; re-en. Secs. 8205, 8206, R.C.M. 1921; Cal. Civ. C. Secs. 2847, 2848; Field Civ. C. Secs. 1568, 1569; re-en. Secs. 8205, 8206, R.C.M. 1935; R.C.M. 1947, 30-504, 30-505.

28-11-418. Surety entitled to benefit of security held by creditor or cosurety. A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor or by a cosurety at the time of entering into the contract of suretyship or acquired by him afterwards, whether the surety was aware of the security or not.

History: En. Sec. 3695, Civ. C. 1895; re-en. Sec. 5692, Rev. C. 1907; re-en. Sec. 8207, R.C.M. 1921; Cal. Civ. C. Sec. 2849; Field Civ. C. Sec. 1570; re-en. Sec. 8207, R.C.M. 1935; R.C.M. 1947, 30-506.

28-11-419. Creditor entitled to benefit of security held by surety. A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation and may, upon the maturity of the obligation, compel the application of such security to its satisfaction.

History: En. Sec. 3700, Civ. C. 1895; re-en. Sec. 5694, Rev. C. 1907; re-en. Sec. 8209, R.C.M. 1921; Cal. Civ. C. Sec. 2854; Field Civ. C. Sec. 1572; re-en. Sec. 8209, R.C.M. 1935; R.C.M. 1947, 30-508.

28-11-420. Principal's property to be taken first. Whenever property of a surety is hypothecated with property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation.

History: En. Sec. 3696, Civ. C. 1895; re-en. Sec. 5693, Rev. C. 1907; re-en. Sec. 8208, R.C.M. 1921; Cal. Civ. C. Sec. 2850; Field Civ. C. Sec. 1571; re-en. Sec. 8208, R.C.M. 1935; R.C.M. 1947, 30-507.

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